Petition

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981

FALSTAFF BREWING CORPORATION and
PAUL KALMANOVITZ,

Petitioners,

vs

CHARLES W. DEPENDAHL, JR. WILLIAM
J. HEALY AND JOHN C. CALHOUN,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Eighth Circuit

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QUESTIONS PRESENTED FOR REVIEW

I.

DOES A DISTRICT COURT HAVE JURISDICTION TO AWARD ATTORNEY FEES AND COSTS PURSUANT TO 29 U.S.C. §1132(g) FOR WORK PERFORMED IN OTHER JURISDICTIONS AND OTHER CASES IN ADDITION TO THE WORK PERFORMED IN THE LAWSUIT PENDING IN THE DISTRICT COURT?

II.

CAN A PLAINTIFF RECOVER ATTORNEY FEES PURSUANT TO 29 U.S.C. §1132(g) FOR FEE RELATING TO PENDANT STATE LAW CLAIMS IN WHICH HE WAS UNSUCCESSFUL?

III.

WHAT IS AN UNFUNDED PLAN UNDER ERISA?

IV.

DID THE COURT ABUSE ITS DISCRETION IN ORDERING THAT THE HARSHEST SANCTIONS AVAILABLE UNDER THE LAW BE IMPOSED ON FALSTAFF?

V.

ARE PLAINTIFFS EVEN ENTITLED TO ACTUAL DAMAGES UNDER ERISA SINCE THEY WERE DISCHARGED FOR PROPER CAUSE?

INDEX

Questions Presented for Review	i
Statutes Involved	iii
Parties to the Proceedings In the Court Below	iv
Table of Authorities	v
Opinons Below	viii
Jurisdiction	1
Statement of the Case	2
Reasons for Granting the Writ	8
Conclusion	41

STATUTES INVOLVED

29 U.S.C. §1132 (a)(1)(B)

29 U.S.C. §1132 (a)(3)

29 U.S.C. 1132 (e)(1)

29 U.S.C. §1132(g)

The text of said statutes is set forth in detail in the appendix filed herein.

PARTIES TO THE PROCEEDINGS

IN THE COURTS BELOW

The caption of this case contains the names of all parties to the proceedings herein.

TABLE OF AUTHORITIES

	Page
Alessi v. Raybestos-Manhattan, Inc., ____ U.S. ____, 68 L. Ed 2d 402, 418 (1981).	16
Aleyska Pipe Line Co. v. Wilderness Society, 421 U.S. 240 (1975).	10
Baer v. Falstaff, (D.Ct. E.D. Mo.).	13
Baughman v. Wilson Freight Forwarding Co., 583 F. 2d 1208, 1215 (3rd Cir. 1978).	20
Dependahl v. Falstaff, 496 F. Supp. 215 (E.D. Mo. 1980).	9,27
Greene v. Emersons, et. al., S.D.N.Y. 76-C-2178	13,38
Gutting v. Falstaff, (D.Ct. E.D. Mo.).	13
Kalmanovitz v. New York Life, (D.Ct. N.D. Cal.).	13
Kropp v. Ziebarth, 557 F. 2d 142, 146 (8th. Cir. 1977).	34
Lakeside Bridge & Steel Co. v. Mountain State Construction, 400 F. Supp. 273 (E.D. Wis. 1975).	35
Levy v. Lewis, 635 F. 2d 960, 968 (2nd. Cir. 1980).	27
Marr v. Rife, 545 F. 2d 554 (6th. Cir. 1976).	21

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980). 14

Picking v. Pennsylvania R.R. Co., 11 F.R.D. 71 (M.D. Pa. 1954). 34

Pierson v. Western Electric Co., 542 F. 2d 1150, 1153 (10th. Cir. 1976). 21

Pine Lawn Bank & Trust v. Urbahns, 417 S.W. 2d 113 (Mo. app. 1967). 20

Schaeffer v. San Diego Yellow Cabs, Inc., 462 F. 2d 1002, 1008 (9th. Cir. 1972). 22

Societe Internationale v. Rogers, 357 U.S. 197 (1958). 30

Williams v. General Foods Corp., 492 F. 2d 399, 409 (7th. Cir. 1974). 22

STATUTES AND OTHER AUTHORITIES

F.R.Civ.P. 37(a) 32,34

F.R.Civ.P. 37(b) 33,34

Wright & Miller, Federal Practice and Procedure, §2285 at p. 774. 35

Internal Revenue Ruling 60-31, 1960-1 C.B. 174. 26

Internal Revenue Ruling 72-75 1972-1 C.B. 172; 26

Internal Revenue Rule 68-69, 1968-1 C.B. 698 26

29 U.S.C. §1001	13
29 U.S.C. §1132(g)	8,11,14,15,16, 17,19,22
29 U.S.C. §1132(a)(1)(B)	12
29 U.S.C. §1132(a)(3)	12
42 U.S.C. §2000(e)-5(k)	15

OPINIONS BELOW

The District Court's opinion concerning the merits of the case is published at 491 F. Supp 1188 (E.D. Mo. 1980). The District Court's opinion relating to the imposition of sanctions is published at 84 F.R.D. 416 (E.D. Mo. 1979). The Court's opinion related to the award of attorney fees is found at 496 F. Supp. 215 (E.D. Mo. 1980).

The decision of the United States Court of Appeals for the Eighth Circuit was rendered June 30, 1981 and is not as yet published. The text of each of these decisions is set forth in the appendix filed herein.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on June 30, 1981. The Court of Appeals denied a Petition for Rehearing or Rehearing En Banc on July 27, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C.§1254(1).

STATEMENT OF THE CASE

In early March, 1975, Falstaff Brewing Corporation, a publically held corporation, was near financial ruin. Unable to meet its current financial obligations, the corporation turned to Paul Kalmanovitz for financial assistance and managerial leadership. On March 10, 1975, Falstaff entered into a written agreement with Kalmanovitz pursuant to which Kalmanovitz agreed to purchase from Falstaff one hundred thousand shares of $100.00 par value preferred stock to be issued. In addition to the investment of Ten Million Dollars, Kalmanovitz also personally guaranteed Ten Million Dollars of Falstaff's debts. Under the terms of the contract, Kalmanovitz was to have voting control of the corporation and was to be made Chairman of the Board.

On March 12, 1975, prior to such agreement being ratified by the stockholders, Kalmanovitz advanced Three Million Dollars on an unsecured basis to pay the bills of the cash starved Falstaff and thereby saved the Company from financial collapse.

Thereafter, on April 28, 1975, the stockholders of Falstaff approved the agreement with Kalmanovitz at the Corporation's annual stockholders meeting. Immediately after the stockholder's meeting on April 28, 1975, the annual meeting of the Board of Directors of Falstaff was held. Kalmanovitz presided at the meeting and was elected Chairman of the Board. Pursuant to the agreement entered into, Kalmanovitz had the right to designate the persons to constitute a majority of the board of directors.

Under the guidance of Kalmanovitz and his staff, they began to apply the remedies needed to save the failing corporation. The remedies included a continuation of the policy of cost cutting and streamlining of the Company. An indirect but necessary by-product of the facelift given to Falstaff was the lay off of employees. Among those discharged were the Director of Marketing, Charles W. Dependahl, and the Secretary/Treasurer, William S. Healey. In retaliation to the circumstances made necessary by the situation these individuals filed an all encompassing and somewhat vengeful lawsuit against their former employer, Falstaff and Kalmanovitz individually.

The fifty-eight paragraphs of the Complaint spread over seventeen pages contained allegations ranging from violations of ERISA, 29 U.S.C. §1001 et. seq. to other common law violations. It sought declaratory relief, injunctive relief, actual damages, punitive damages and attorney's fees.*

Several months thereafter, John Calhoun, another employee of Falstaff, was discharged. After contacting the attorneys for Dependahl and Healey, Calhoun filed an almost identical lawsuit

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* Jurisdiction in the District Court was based upon 29 U.S.C. §1132(e) and 28 U.S.C. 1332, text of said statutes set forth in the appendix.

against Falstaff and Kalmanovitz. These cases were thereafter consolidated. Days before the beginning of the trial the trial court struck Falstaff's affirmative defenses and counterclaims. (See appendix).

On December 17, 1979, trial was commenced before the court without a jury and continued for six days. On June 9, 1980, the court entered its order granting relief to the former executives on the ERISA and tortious interference with the contract claims but denied relief on a fraud claim. (See appendix).

On July 15, 1980, the district court conducted a hearing on the amount of attorney's fees to be awarded the former executives under the ERISA Attorneys Fees Statute, 29 U.S.C. §1132(g). On August 28, 1980, the court entered its Order and Memorandum Opinion awarding One Hundred Forty-nine Thousand One Hundred

Seventy-five Dollars in attorneys fees and expenses of Thirteen Thousand Dollars. (see appendix).

Upon appeal, the United States Court of Appeals for the Eighth Circuit reversed the lower court's judgment relating to the tortious interference with contract. The Court of Appeals affirmed the district court on its finding of ERISA violations and affirmed the award of attorneys' fees and costs. (See appendix).

REASONS FOR GRANTING WRIT

I.

DOES A DISTRICT COURT HAVE JURISDICTION TO AWARD ATTORNEYS FEES AND COSTS PURSUANT TO 29 U.S.C. §1132(g) FOR WORK PERFORMED IN OTHER JURISDICTIONS AND OTHER CASES IN ADDITION TO THE WORK PERFORMED IN THE LAWSUIT PENDING IN THE DISTRICT COURT.

Can an attorney admit that he is seeking an award of attorneys fees for work performed in other jurisdictions on other cases and be awarded fees for this "other" work under the terms of 29 U.S.C. §1132(g)? It appears that the Court of Appeals for the Eighth Circuit has answered this question affirmatively in this case.

In the proceeding below, counsel for

plaintiffs admitted that at least eight percent of the fees requested were related to work that was performed in other courts and on other matters than those pending before the District court.* The District Court acknowledged that the plaintiffs sought fees for other work but disregarded the fact stating:

> "The small proportion of this time which related to other litigation concerning the same facts as these cases need not be excluded."

Dependahl v. Falstaff, 496 F. Supp. 215 (E.D. Mo. 1980). (See appendix).

By not excluding this "other" work, the Court exceeded its jurisdiction by thereafter awarding attorney's fees to plaintiffs for this work. The Court in essence awarded a "clean-up award" and ordered the defendants to pick up the

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* Falstaff and Kalmanovitz contend that plaintiffs sought and received fees for more than 8% of fees related to other matters.

entire tab for plaintiffs for work their attorneys performed throughout the country over a period of several years. The Court of Appeals in affirming the award determined that there was no abuse of discretion on the district judge's part. The question is not one of discretion to award fees but one of jurisdiction to award fees. The Court of Appeals ignored this point in their Opinion and adopted the position of the district court.

By adopting such a position, the Court of Appeals abdicated their supervisory role in the federal court system. The result will be staggering due to the fact that they have now extended the Congressionally mandated jurisdictional provision of ERISA.

It is the general rule in the United States that in the absence of legislation providing otherwise, litigants must pay their own attorney's fees. Alyeska Pipe

Line Co. v. Wilderness Society, 421 U.S. 240 (1975). Congress has provided only limited exceptions to this rule "under selected statutes granting or protecting various federal rights". Id. at 240.

In the instant case, the Statute involved was 29 U.S.C. §1132(g) which provides,

> "In any action under this subchapter by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and cost of action to either party".

The plain language of the Statute clearly gives the Court jurisdiction to award attorney's fees and costs. The Statute does, however, limit the court's power to award fees for "action under this subchapter". It is apparent that Congress has limited the jurisdiction

of the Court to award fees only for fees incurred in proceeding with an action to secure relief provided for in 29 U.S.C. §1132(a)(1)(B) and (a)(3). *

In the instant case, plaintiffs sought and received an award of fees for their attorneys' work throughout the United States during the many years the case was pending. These cases were not related to the case before the District Court nor did they involve any questions

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* 29 U.S.C. §1132(a)(1)(B) states "A civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan".

(A)(3) states that "A civil action may be brought by a participant, beneficiary or fiduciary (a) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan or (b) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan".

relating to ERISA. In fact, the District Court awarded plaintiffs' counsel fees for their work on behalf of plaintiffs during investigations of plaintiffs before the S.E.C., A.T.&F., I.R.S. and a Justice Department Investigation. In addition, the District Court awarded plaintiffs' counsel fees for their defense of plaintiffs in litigation throughout the country. The other litigation was identified as Greene v. Emersons, (D.Ct. S.D.N.Y.); Kalmanovitz v. New York Life, et. al., (D.Ct. N.D.Cal.); Gutting v. Falstaff, (D.Ct. E.D. Mo.); Baer v. Falstaff, (D.Ct. E.D. Mo.); Balco Litigation; Pflaumer litigation.

Not one of these cases involved plaintiffs' alleged claims under ERISA, 29 U.S.C. §1001, et. seq., and not one of these cases was brought by plaintiffs. Even under the terms of 29 U.S.C.

§1132(g), fees can be awarded only for "an action under this subchapter by a participant . . .". None of the other cases fit this requirement.

This case does not resemble the case of New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980). In New York Gaslight, this Court held that a plaintiff who sought relief in a state court was entitled to an award of attorney's fees pursuant to the Congressionally created statute. Id. at 66.

The rationale for the decision in New York Gaslight, was the wording of the Statute involved. In New York Gaslight the Statute provided that,

> "In any action or proceeding under this title, the Court, in its discretion, may allow the

> prevailing party, other than the commissioner or the United States, a reasonable attorney's fee as part of the costs".

42 U.S.C. §2000(e)-5(k).

This court reasoned that the inclusion of the phrase "or proceeding" indicated Congress's intention not to restrict the award of fees for work solely performed in the federal court where the action was pending. Id. at 62, 63. In addition, the Statute provided that an individual must proceed through other concurrent administrative remedies prior to seeking relief in the federal system. Id. at 62.

It is inescapable to note that the jurisdiction for granting attorney's fees in the ERISA statute, 29 U.S.C. §1132(g) does not contain the phrase "or proceeding". Therefore, Congress clearly

intended to limit the award of fees pursuant to ERISA for work only in an "action under this subchapter" and nothing else.

Further, it is clear that Congress intended to preempt state law in this area. Alessi v. Raybestos-Manhattan, Inc., ___ U.S. ___, 68 L. Ed. 2d 402, 418 (1981), therefore, there is no interplay between state action and the federal action.

With this in mind, it is clear that Congress intended to limit the award of attorney's fees pursuant to 29 U.S.C. §1132(g). Therefore, the district court did not have jurisdiction to award fees in excess of those that were incurred in bringing "an action" under the ERISA

statute. The tragic result of the district court's action was that the plaintiffs were awarded total actual damages of $45,034.00 yet due to the court's erroneous application of 29 U.S.C. §1132(g), plaintiffs' attorneys were awarded $162,175.00 in fees and costs. The Court of Appeals in disregarding this act of the lower court has sanctioned the violation of the mandate of Congress and as such, this Court should issue its Writ of Certiorari to review the issue involved and its effect on litigants and the federal judiciary.

II.

CAN A PLAINTIFF RECOVER ATTORNEY'S FEES PURSUANT TO 29 U.S.C. §1132(g) FOR FEES RELATING TO PENDENT STATE LAW CLAIMS IN WHICH HE WAS UNSUCCESSFUL.

In the case below, the plaintiffs joined several pendent state common law claims with their claims under ERISA. Their main effort at trial was their attempt to prove their common law fraud claim and seek punitive damages. The fraud claim turned out to be little more than a pipe dream since the district court found that the alleged fraudulent misrepresentations (the heart of plaintiffs' claim) were not even made. 491 F. Supp. at 1199.

After the lengthy trial, plaintiffs failed to prove any of the state law claims except for tortious interference with contract, which was reversed by the Eighth Circuit Court of Appeals. Plaintiffs' lawyers, however, received a windfall even after losing since the Court awarded attorneys' fees even for

the efforts on the alleged state law claims that never materialized.

The Court made the award of fees for state law claims under the mistaken belief that 29 U.S.C. §1132(g) gave him jurisdiction. 496 F. Supp. 215. The court also stated that,

> "This Court need not make an artificial distribution of the attorney's time between successful and unsuccessful claims . . .".

496 F. Supp. 215.

This eggregious behavior was again an example of the Court exceeding the jurisdictional limits established by Congress when they enacted ERISA. Though there is no direct authority discussing the award of these types of fees under ERISA, since the act is relatively new, one must look to other

federal statutes for guidance.

Other circuits have clearly held that when awarding fees pursuant to a federal statute the court does not have jurisdiction to award fees for work done in connection with state law claims. Baughman v. Wilson Freight Forwarding Co., 583 F. 2d 1208, 1215 (3rd. Cir. 1978).

In the instant case, the point is greater due to the fact that if the state common law claims would have been brought in the state court, there could have been no award of attorney's fees to plaintiffs whether successful or unsuccessful. Pine Lawn Bank & Trust v. Urbahns, 417 S.W. 2d 113 (Mo. App. 1967).

Why should plaintiffs herein receive a windfall? Where in the reported cases

have unsuccessful plaintiffs recovered attorney's fees? If this result is left standing, the result will likely be increased federal litigation. Now every litigant who has even a colorable federal claim will join with it state claims in the hope of recovering all of the attorney's fees expended even if he is unsuccessful on the state claims.

This procedure is intolerable. One method that has been used successfully in several circuits is the "proportionate share concept". This concept has been applied when awarding attorney's fees pursuant to an act of congress as in this case. The courts that have applied it have held that the amount of the award should be proportionate to the extent to which plaintiffs prevail in the suit. Marr v. Rife, 545 F. 2d 554 (6th. Cir. 1976); Pierson v. Western Electric Co.,

542 F. 2d 1150, 1153 (10th. Cir. 1976); Williams v. General Foods Corp., 492 F. 2d 399, 409 (7th. Cir. 1974); Schaeffer v. San Diego Yellow Cabs, Inc., 462 F. 2d 1002, 1008 (9th. Cir. 1972).

This concept should have been adopted herein. The great harm that has resulted from the court exceeding its jurisdiction herein reflects poorly on the legal profession. In the instant case, plaintiffs recovered actual damages in the amount of $45,034.00, yet their attorneys recovered $162,175.00 in attorney's fees and costs. Surely the public will have a difficult time understanding this outcome.

The court could have remedied this situation by staying within its jurisdictional grant provided by 29 U.S.C. §1132(g) and by applying the proportionate share concept.

This court should issue its Writ of Certiorari to the Eighth Circuit for review of these issues in their infancy so that the correct action may be established early in the life of the ERISA statute.

III.

WHAT IS AN UNFUNDED PLAN UNDER ERISA?

The Court below has ruled that a "death benefit only" plan using key man life insurance as the financing mechanism is a "funded" plan for ERISA purposes.

This decision is of paramount interest to the legal community for two reasons. First, because of the fact that insurance companies and corporations have

labored long and hard to arrange deferred compensation plans that fit the guidelines set forth by the Internal Revenue Service so that maximum tax benefits could be achieved. Secondly, because the lower court's decision is incorrect.

The Court of Appeals for the Eighth Circuit in bold language unadorned by citations stated,

> "All whole life insurance policies which have a cash value with premiums paid in part by corporate contributions to an insurance firm are funded plans".

This analysis is patently incorrect. Traditionally, plans were created and structured to be "unfunded" in light of the I.R.S. definitions. After the Eighth Circuit ruling in Dependahl, one is left with the impression that the "funded"

definition under ERISA takes on a different meaning than the definition under the Internal Revenue Code.

In the instant case, Falstaff had what it considered to be an "unfunded" plan. In essence, the plan provided benefits to the beneficiaries of a few select executives. These benefits were to be paid from the general assets of Falstaff and were nothing more than an unsecured contractual promise. To help in this regard, Falstaff purchased key man life insurance policies covering the executives' lives. These policies being owned by Falstaff were subject to the claims of creditors.

This type of arrangment has consistently been held to be "unfunded" for income tax purposes as long as (1) the agreement is entered into prior to

the services being rendered; and (2) the employer's promise is not secured in any way. (Rev. ruling 60-31, 1960-1 C.B. 174).

A promise has been deemed not to be secured when a life insurance contract is used to support the agreement if (a) the employer is the applicant, owner and premium payor on the policy; (b) the executive has no beneficial interest in the policy; and (c) the policy is accessible to the employer's general creditors. (Rev. Ruling 72-75, 1972-1 C.B. 172; Rev. rule 68-69, 1968-1 C.B. 698).

Since all of these conditions were met in the instant case, there was no reason at all that the plans were not found to be "unfunded". There was no

reason supplied by the Court for its departure from the well established I.R.S. guidelines. In fact, the Eighth Circuit did not even address the point.

The Eighth Circuit's ruling that the plan was funded is in direct conflict with the holding in Levy v. Lewis, 635 F. 2d 960, 968 (2nd. Cir. 1980). In Levy, the Second Circuit held that an ERISA welfare benefit plan which "merely involved the yearly payment out of (employer's) general operating revenues of premiums on an insurance contract" was an unfunded plan with no assets.

It appears that the Levy opinion is consistent with the prior teachings of the I.R.S. Code and Revenue regulations. For the Court in Dependahl to have overlooked these matters and create a new

classification without any further guidelines is destructive. The Dependahl opinion should have been consistent with the I.R.S. rulings of the past covering the same topics. Where did the Eighth Circuit arrive at its guidelines for its ruling? If the Dependahl decision is not corrected, the effect upon corporations throughout the country will be enormous. Those with plans in existence will have to modify them to avoid the ill effects of the Dependahl case. By doing that, however, they will risk a possible conflict with the I.R.S. Code and Revenue Rulings.

The only solution is for the two sets of criteria to be the same. This will not only allow for a harmonious relationship between two Acts of Congress but will prevent the restructuring of all

the existing plans. This Court should issue its Writ of Certiorari to the Eighth Circuit Court of Appeals so that it can examine this matter in light of the importance of the question involved herein and the conflict between the Eighth Circuit and Second Circuit.

IV.

DID THE COURT ABUSE ITS DISCRETION IN ORDERING THAT THE HARSHEST SANCTIONS AVAILABLE UNDER THE LAW BE IMPOSED ON FALSTAFF?

Seven days before the trial of this matter, the district court ordered that all eleven affirmative defenses and all counterclaims of the defendants be dismissed. The resulting harm to the defendants was immediately evident. Stripped of its defenses and counterclaim

it was forced to trial without the most cogent defense of all, the true facts. The fact that the evidence herein was suppressed constitutes but a part of the evidence revealing that the district court abused its discretion in granting sanctions. A more telling example of its abuse is seen by the fact that the Court granted the most severe sanctions possible under circumstances where they were not appropriate.

In essence, the Court's actions amounted to "punishment" in excess of the powers provided by the Federal Rules of Civil Procedure in light of the Constitutional restraints imposed upon the Court instituting the sanctions. This court in Societe Internationale v. Rogers, 357 U.S. 197 (1958) stated,

> "The provisions of Rule 37 which are herein involved must be read in light of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly,

> the opinions of this Court in Hovey v. Elliott, 167 U.S. 409 . . . and Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909) . . . these decisions established that there are Constitutional limitations upon the power of courts even in aid of their own valid processes to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. . . ".

In the instant case, a review of the facts surrounding the court's grant of sanctions will clearly reveal that the Court's actions were inappropriate and denied Falstaff its due process rights under the Fifth Amendment. The harsh dismissal of defendants' action was instigated by the answers to interrogatories filed by Falstaff. Early in the litigation, around March 7, 1978, the plaintiffs served Falstaff with a burdensome set of interrogatories consisting of thirty-five interrogatories with many subparts spread over thirty-five pages. On March 10, 1978,

Falstaff filed a routine motion with the Court seeking an extension of time in which to file their answers. This simple request was denied outright. On the day of denial, Falstaff filed a motion for protective order. Thereafter, on March 17, 1978, plaintiffs moved pursuant to F.R.Civ.P. Rule 37(a) for an order compelling Falstaff to answer the interrogatories. On March 27, 1978, Falstaff's Motion for a Protective Order was denied and plaintiffs' Motion to Compel was granted with Falstaff being given seven days to answer. Falstaff's compliance with the Court's order was made impractical when plaintiffs on March 31, 1978, moved to enforce settlement of the case approved by the Court.

Thereafter, the matter was returned to the district court for trial. After remand, no formal request for answers to said interrogatories by plaintiffs was

filed with the Court until they filed a motion for sanctions. Falstaff was, however, continuing to voluntarily provide discovery to plaintiffs. On October 11, 1979, counsel for Falstaff filed the Answers to Interrogatories that were previously prepared. Plaintiffs filed no motions directed to said answers and Falstaff thereafter filed supplemental answers on November 13, 1979.

The plaintiffs responded to what they felt were inadequate answers by filing a motion pursuant to F.R.Civ.P. Rule 37(b) seeking the harshest sanctions available including dismissal of defendant, Falstaff's, counterclaims and affirmative defenses.

On December 10, 1979, the Court granted plaintiffs' request and passed over the lesser sanctions provided for in the Rules striking Falstaff's counter-

claims and affirmative defenses. In so acting, the Court abused its discretion ignoring the provisions of Rule 37(b)(2) which provides that the Court, "may make such orders in regard to the failure as are just . . .". In its desire to punish Falstaff, the Court overlooked the decisions of the Court of Appeals and this Court regarding sanctions.

Under the Federal Rules of Civil Procedure, it is clear that Rule 37(b) sanctions cannot be imposed unless there is first an order under Rule 37(a) in effect. Kropp v. Ziebarth, 557 F. 2d 142, 146 (8th. Cir. 1977).

In the instant case, it is clear that Falstaff complied with the March 27, 1978 order compelling the answers to be filed when they filed their answers on October 11, 1979. Under these circumstances, the Rule 37(a) order was extinguished. Picking v. Pennsylvania

R.R. Co. , 11 F.R.D. 71 (M.D. Pa. 1954) cert. den. 345 U.S. 1000; Wright & Miller, Federal Practice & Procedure, §2285 at p. 774.

In fact, Falstaff filed supplemental answers to interrogatories which were never objected to by plaintiffs. Under these circumstances, sanctions pursuant to Rule 37(b) were excessive and amounted to punishment in violation of the Fifth Amendment to the United States Constitution. See Lakeside Bridge & Steel Co. v. Mountain State Construction, 400 F. Supp. 273 (E.D. Wis. 1975).

In essence, the Court's actions denied Falstaff its "day in court", a situation that is not permissible under the Rules of Civil Procedure and the Constitutional provisions that provide paramount guidance in the courts.

In this action, since there was no regard for the Constitutional rights of

Falstaff, Falstaff had to sit by and watch the individuals who had committed the wrongful acts escape liability due to the fact that Falstaff was not allowed to develop its defenses. This degree of prejudice is not forced upon the most heinous criminals and it certainly has no place in civil litigation in this country. This Court should issue its Writ to examine the interplay of the Federal Rules of Civil Procedure and the Constitutional provisions affording litigants rights of due process in the federal courts.

V.

ARE PLAINTIFFS EVEN ENTITLED TO ACTUAL DAMAGES UNDER ERISA SINCE THEY WERE DISCHARGED FOR PROPER CAUSE?

The Eighth Circuit Court of Appeals affirmed the district court's finding

that the plaintiffs were not discharged for cause. Under these circumstances, and with a view toward the evidence, it is unclear exactly how an employer corporation is to determine the grounds upon which an employee may be discharged without recourse. In the instant case, the evidence, some of which came from the testimony of the plaintiffs themselves, clearly reveals circumstances justifying their discharge for cause. As such, this Court should re-examine the Opinion rendered below.

In the case below, the evidence revealed that the employees did in fact engage in unethical, if not illegal conduct and refused to properly follow directions of the corporate management. Under such circumstances, there is no basis in the law to justify the finding that the corporation was not entitled to

discharge these individuals.

In regard to the evidence surrounding the employees, it was clear that Dependahl's conduct indicated a relatively uninformed knowledge of the beer business showing his lack of qualification for the job. In fact, it was clear that Dependahl during his tenure as national sales manager engaged in conduct which resulted in Falstaff being accused of 352 violations of the Alcohol, Tobacco and Firearms Code. In addition, Dependahl's conduct resulted in Falstaff being made a party in the case of Greene v. Emersons, et. al., S.D.N.Y. 76-C-2178. In the Greene matter allegations surfaced against Falstaff concerning the concealment of alleged illegal rebates for beer purchases. Further, Dependahl was the target of an

investigation by the Justice Department and A.T.&F. regarding illegal conduct while employed by Falstaff.

It was also clear that Healey, as Secretary-Treasurer violated the fiduciary duties associated with such a position when he was involved in the "change of corporate minutes" which caused Falstaff to be in default of its financial obligations. This occurred at a time when Falstaff was precariously close to bankruptcy. In fact, Healey also engaged in the execution of notes far in excess of the prime interest rate at a time when Falstaff was teetering on financial destruction. * This misconduct was a contributing factor to Falstaff's

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*He participated in the execution of a note for Thirty-nine Million Dollars payable on demand when in fact the records state said amount was not owing at the time.

poor financial health.

How can it be said that a corporation cannot discharge individuals engaged in this type of behavior and then be penalized for taking actions that were for the benefit of the corporation itself?

The evidence surrounding Calhoun's gross acts of insubordination and his continuing failure to do his job clearly justified his termination for cause. Acts of insubordination of the magnitude engaged in by Mr. Calhoun would have resulted in his termination by any corporation. When Calhoun himself admits misdeeds alleged and the result of his conduct clearly revealed that he had harmed the corporation, it is incredible to believe that Falstaff was not entitled to discharge this individual without

repercussion.

In light of the extensive evidence indicating valid and prevailing reasons for the discharge of the executives, the Court should not have shielded their conduct under the protections of ERISA. This Court should issue its writ to the Court of Appeals to determine the extent to which ERISA shields an employee's illegal or wrongful conduct from scrutiny by the Corporation.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully submit that this court should grant its Writ of Certiorari to the Court of Appeals for the Eighth Circuit and examine the issues involved herein.

Respectfully Submitted,

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Appendix

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81-449

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981

FALSTAFF BREWING CORPORATION and
PAUL KALMANOVITZ,

Petitioners,

vs

CHARLES W. DEPENDAHL, JR. WILLIAM
J. HEALY AND JOHN C. CALHOUN,

Respondents.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Eighth Circuit

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INDEX

	Page
Dependahl v. Falstaff Brewing Corp. 84 F.R.D. 416 (E.D. Mo. 1979). December 10, 1979 - Sanctions	1
Dependahl v. Falstaff Brewing Corp. 491 F. Supp. 1188 (E.D. Mo. 1980) June 9, 1980 - Decision on Merits	14
Dependahl v. Falstaff Brewing Corp., 496 F. Supp. 215 (E.D. Mo. 1980). July 15, 1980 - attorney's fees	57
Dependahl v. Falstaff Brewing Corp. Court of Appeals Eighth Circuit June 30, 1981 - Appeal	65
Dependahl v. Falstaff Brewing Corp., U.S. Court of Appeals Eighth Circuit July 27, 1981 - Order Denying Rehearing or Rehearing En Banc	108

Statutes

29 U.S.C. §1132(a)(1)(B)	109
29 U.S.C. §1132(a)(3)	109
29 U.S.C. §1132(e)(1)	110
29 U.S.C. §1132(g)	110

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CHARLES DEPENDAHL, et al.,

Plaintiffs,

vs

FALSTAFF BREWING CORPORATION, et al.,

Defendants.

No. 75-701 C (2)

JOHN C. CALHOUN,

Plaintiff,

vs

FALSTAFF BREWING CORPORATION, et. al.,

Defendants.

No. 76-24 C (2)

MEMORANDUM

These cases are now before the Court on Plaintiffs' motion for sanctions pursuant to Rule 37(b), Federal Rules of Civil Procedure. This motion is brought due to Defendant Falstaff Brewing Corporation's ("Falstaff") refusal to properly and timely

respond to interrogatories. Plaintiffs brought this suit alleging various violations of the Employees Retirement Income Security Act of 1974, 29 U.S.C. SS1001 to 1144, along with several common law counts.

Falstaff responded with numerous affirmative defenses and counterclaims, some of which raised serious allegations of misconduct on the part of plaintiffs. Among these allegations are charges that plaintiffs breached their fiduciary duty as directors of Falstaff and that they participated in the making of payments illegal under the Federal Alcohol Administration Act, 27 U.S.C. S205(b) (3) and (4).

Plaintiffs have been trying unsuccessfully to obtain information relevant to these affirmative defenses and counterclaims from Falstaff for a long time. For the most part, these efforts have been blocked by obfuscation, obstruction, and dilatory tactics on the part of Falstaff. The instant motion for sanctions arises from defendant's actions with

respect to plaintiffs' interrogatories.

After finding other avenues of discovery unfruitful, plaintiffs propounded interrogatories to Falstaff on February 7, 1978. The interrogatories were neither complex nor excessively burdensome. They were, for the most part, simple "contention" interrogatories, seeking to discover the factual basis for the allegations raised by defendant in its affirmative defenses and counterclaims, as well as the identity of persons with knowledge of those facts and the identity of relevant documents. Defendant's initial response to these interrogatories was apparently little or no action. On March 10, 1978, Falstaff moved this Court for an extension of time in which to respond to the interrogatories. The request was denied.

On that same date, Falstaff moved for a protective order with respect to these interrogatories. This motion was predicated on the astounding argument that the interrogatories were not designed to lead to the

discovery of admissible material but rather merely to oppress and burden the defendant. In view of the fact that plaintiffs' interrogatories directly corresponded to the allegations raised in defendant's counterclaim and affirmative defenses, it is this Court's opinion that defendant's claim that the interrogatories sought irrelevant material was merely a dilatory tactic. On March 17, 1978, plaintiffs moved pursuant to Rule 37 (a) for an order compelling defendant to answer. On March 27, 1978, defendant's motion for a protective order was denied and plaintiffs' motion to compel an answer was granted. Falstaff was ordered to answer the propounded interrogatories within seven days.

The parties were concerned about matters other than the interrogatories for quite a while after this Order. This was due to plaintiffs' motion to enforce a settlement. Attention was directed to this Motion by

both the parties and the Court. On April 18, 1978, the settlement was enforced. 448 F.Supp. 813 (E.D.Mo. 1978). This decision was appealed by both sides. On February 26, 1979, the Eighth Circuit vacated the settlement and remanded to this Court for further proceedings. 594 F.2d 869.

Shortly after this remand, plaintiffs again requested that Falstaff answer the earlier interrogatories. Over a period of approximately seven months plaintiffs repeatedly requested answers and defendant continually responded that answers would be forthcoming. Finally on October 11, 1979, Defendant filed answers to Plaintiffs' interrogatories.

These answers were woefully insufficient. Numerous questions were objected to, even though Falstaff's initial objections had already been overruled by this Court and the time for objecting had since passed. See Rule 33(a), Federal Rules of Civil Procedure. Other interrogatories

were not answered at all, were only partly answered, were evasively answered, or were answered by reference to documents which were either not sufficiently specified or not attached to the answers as the response indicated they would be.

The most damaging to Defendant's present position is, however, the fact that the answers given by Defendant were prepared more than a year and a half earlier. These answers were prepared by Defendant's previous counsel and were notarized April 3, 1978. Admittedly, Defendant may be excused for not serving these answers during the approximately eleven months that the "settlement" issue was being litigated. There is absolutely no excuse, however, for Defendant's not having served the answers when Plaintiffs renewed their request in March of 1979. To delay seven additional months during which time the answers were already prepared and ready for service is clearly inexcusable, especially

in light of the obviously incomplete and evasive nature of these answers. Defendant clearly sought to delay and obstruct Plaintiffs' legitimate discovery requests, a tactic which cannot be tolerated under the voluntary scheme of discovery envisioned by the Federal Rules of Civil Procedure.

Upon receipt of these answers, Plaintiffs immediately began efforts to obtain satisfactory answers. These efforts have met with slightly more success. On November 1, 1979, Defendant sent Plaintiffs a draft of supplemental answers to these interrogatories. These supplemental answers were filed with the Court on November 13, 1979.

These answers were also incomplete and evasive. Reference is made to documents from which the requested information can be obtained, but these documents are not specified sufficiently so as to enable plaintiffs to find the answers without extensive efforts on their part. Cf. Rule 33(c), Federal Rules of Civil Procedure. Some questions are

answered that supplemental answers would be forthcoming, but to date no such further information has been supplied. Others are answered that Falstaff is in the process of obtaining the requested information from its insurance companies, though it is obvious that Falstaff has had more than enough time to do so if even a minimal effort was made. Finally, some questions continue to be totally unanswered. These supplemental answers were also considered insufficient by Plaintiffs, and on November 23, 1979 the instant motion for sanctions was filed.

It is apparent to this Court that Defendant has engaged in a continuous pattern of delay and obstruction. It is also apparent that this delay has been caused as much by Defendant itself as by its counsel. Falstaff has changed counsel numerous times, each change further delaying the orderly disposition of this lawsuit. Though this Court normally does not question a litigant's

desire to change counsel, when it is done as repeatedly as has Defendant in this case, this Court must strongly presume that it is done more as a dilatory tactic than in a legitimate desire to engage substitute counsel.

Defendant initially argues that this Court is without authority to impose sanctions in the present situation. According to Defendant, once the supplemental answers were filed Plaintiffs' only recourse if unsatisfied was to file a motion to compel more complete answers. Absent the non-compliance with a 37(a) order mandating more complete answers, defendant argues, sanctions are inappropriate.

This Court does not believe that it is impotent to deal with Defendant's bad faith and willful refusal to timely comply to reasonable discovery requests. Defendant was ordered to answer the interrogatories in question in March of 1978, over a year and a half ago. This Order obviously carried with the the implicit condition to

answer fully and completely. Rule 33 (a), Federal Rules of Civil Procedure. Defendant has failed to do so.[1/] This Court must therefore conclude that it has ample authority to impose sanctions in the present case. Philadelphia Housing Auth. v. American Radiator & S. San. Corp., 50 F.R.D. 13 (E.D.Pa. 1970); Seanor v Bair Transport Company of Delaware, Inc., 24 F.R.D. 456 (E.D.Pa. 1959).

Falstaff also asserts that the information plaintiffs seek is available through other discovery means. Plaintiffs attempted to utilize these alternative avenues and found them to lead nowhere. Plaintiffs now

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1/ Cf. Rule 37(a)(3), Federal Rules of Civil Procedure: "Evasive or Incomplete Answer. For purposes of this subdivision an answer or incomplete answer is to be treated as a failure to answer." Though this subsection does not technically apply to subdivision (b) of Rule 37, it has been held that a similar rule is applicable with respect to a motion for sanctions. Alliance to End Repression v. Rochford, 75 F.R.D. 438 (N.D.Ill. 1976).

desire to proceed through the use of interrogatories. Plaintiffs have the right to choose this procedure, and that decision must be respected by Defendant.

This Court is reluctant to impose the drastic sanctions of default or dismissal in all but the most egrerious cases. A litigant's day in Court should not be readily denied. Fox v. Studebaker-Worthington, Inc., 516 F. 2d 989 (8th Cir. 1975). This case, however, calls for such sanctions. Defendant has engaged in a continuing pattern of delay and obstruction. Defendant's conduct is one of the most egrerious examples of such tactics I've witnessed since on the bench.

Such conduct cannot be tolerated. The Court stated this principle in Denton v. Mr. Swiss of Missouri, Inc., 564 F.2d 236, 241 (8th Cir. 1977), as follows:

> The judicial system cannot tolerate litigants who flagrantly refuse to comply with the Orders of the Court and who refuse to make discovery, for "delay and

> evasion are added burdens on litigants, causing waste of judicial and legal time, are unfair to the litigants and offend the administration of justice." (Citation omitted)

Defendant's able and experienced counsel was obviously aware of the possibility of sanctions. Previous motions for such sanctions have been made to this Court, and Defendant has been warned of such sanctions by this Court and others.

This case is presently set for trial in less than two weeks. At this time, Plaintiffs are still uninformed as to the basis of Defendant's allegations. Defendant's dilatory tactics have severely prejudiced Plaintiffs in their efforts at trial preparation, and are inexcusable in the view of this Court.

Therefore, Plaintiffs' motion for sanctions will be granted. National Hockey

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2/ Companion cases now pending before other Courts have experienced similar discovery difficulties.

League v Met. Hockey Club, 427 U.S. 639 (1976). Defendant Falstaff's affirmative defenses and counterclaims will be stricken and Plaintiffs will be awarded a reasonable attorney's fee for their efforts in this litigation to obtain answers to their interrogatories. The parties should agree upon a reasonable figure among themselves; if no such agreement is reached, evidence on the issue may be presented at trial.

John F. Nangle
UNITED STATES DISTRICT JUDGE

Dated: December 10, 1979.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CHARLES W. DEPENDAHL, JR., et al.,

Plaintiffs,

vs

FALSTAFF BREWING CORPORATION, et al.,

Defendants.

No. 75 - 701 C (2)

JOHN C. CALHOUN,

Plaintiff,

vs

FALSTAFF BREWING CORPORATION, et al.,

Defendants.

No. 76 - 24 C (2)

MEMORANDUM

Plaintiffs brought these actions alleging violations of the Employee Retirement Income Security Act of 1974, 29 U.S.C. SS1001 to 1144, as well as common law fraud and tortious interference with contractual relations.

These cases were consolidated and tried before this Court without a jury. This Court having considered the pleadings, the testimony of the witnesses, the documents in evidence, the stipulations of the parties, and being fully advised in the premises hereby makes the following findings of fact and conclusions of law as required by Rule 52, Federal Rules of Civil Procedure.

FINDINGS OF FACT

1. Defendant, Falstaff Brewing Corporation ("Falstaff") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in the State of California. It is actively engaged in interstate commerce.

2. Defendant, Paul Kalmanovitz ("Kalmanovitz") is a resident of the State of California. Since on or about April 28, 1975, Kalmanovitz has been controlling shareholder in Falstaff, and has personally run its operations, acting as if he alone owned the Corporation.

3. Plaintiff, Charles W. Dependahl, Jr. ("Dependahl") is a resident of the State of Missouri. Except for a military leave of absence during World War II, he was employed by Falstaff from January 1, 1937 until May 1, 1975. From November, 1972 until his discharge, Dependahl was Vice-President, Director of Marketing for Falstaff. At the time of his discharge, Dependahl's salary was forty-five thousand dollars ($45,000.00) per year.

4. Plaintiff, Willian S. Healy ("Healy") is a resident of the State of Missouri. He was employed by Falstaff from July 7, 1936 until May 1, 1975. From November, 1972 until his discharge, Healy was Vice President, Secretary and Treasurer for Falstaff. At the time of his discharge, Healy's salary was forty-five thousand dollars ($45,000.00) per year.

5. Plaintiff, John C. Calhoun ("Calhoun") is a resident of the State of Missouri.

He was employed by Falstaff from July 5, 1966 until August 8, 1975. From November, 1972 until his discharge, Calhoun was Comptroller for Falstaff. Additionally, Calhoun served as Secretary and Treasurer of Falstaff from May 1, 1975 until early July, 1975. Calhoun's salary was thirty-two thousand dollars ($32,000.00) per year.

6. In 1953, Falstaff adopted the Falstaff Brewing Corporation Retirement Plan for Salaried Employees ("Pension Plan"). This Plan was revised in 1970. Under the terms of the plan, as revised, an employee's benefits become vested upon ten years employment with the Corporation. Plaintiffs Dependahl and Healy are presently receiving their benefits under the Plan. Plaintiff Calhoun was not employed by Falstaff for ten years, and therefore is not receiving benefits under the Plan.

7. Prior to 1953, Falstaff purchased life insurance policies on covered employees,

those employees holding a vested interest in the policies. Dependahl has requested, but has yet to receive, the cash value of pre-1953 policies issued by the Travelers Insurance Company. The paid-up value of these policies is five thousand five hundred ninety-eight dollars ($5,598.00).

8. The Falstaff Severance Policy No. III-50 ("Severence Policy") was duly adopted by Falstaff on March 1, 1973, and was in effect at the time of the discharges of Dependahl and Healy. This Policy was included in the Falstaff Policy Manual which was circulated to all employees.

9. Under the terms of this Severence Policy, upon involuntary termination of employment with Falstaff, an employee is entitled to one week's salary for each completed year of service, up to a maximum of twenty-six weeks' salary. These benefits are completely forfeited if the employee is terminated involuntarily for violations of normal decency, such as fighting or gross

insubordination. If the employee is terminated involuntarily due to "inadequate performance or similar reasons controllable by the employee", the employee is entitled to two weeks' salary as severance pay.

10. The Severence Policy was amended in June, 1975 to provide that no benefits are payable unless the employee had been with Falstaff for at least fifteen years. The Policy was changed at Kalmanovitz's direction, in anticipation of mass firings of Falstaff employees, in order to deprive Falstaff employees of their rightfully entitled benefits.

11. On December 19, 1966, Falstaff adopted a death benefit plan for key employees which entailed the purchase of split-dollar insurance policies on the lives of the employees covered. On December 27, 1972, this split-dollar plan was replaced with a plan entitled Contractual Benefit Plan for Survivors of Selected Executives

of Falstaff Brewing Corporation ("CBS Plan"). Under the terms of this Plan, the named beneficiaries of the executive are to receive annuity income benefits upon the executive's death, with Falstaff recovering the annual premiums previously paid, with interest. Benefits are forfeitable upon discharge for proper cause, which includes, but is not limited to, failure to perform assigned duties with reasonable skill and diligence, gross misconduct or conviction of a felony.

12. This Plan is funded through the purchase, by Falstaff, of life insurance policies on the lives of approximately twelve to fifteen executives covered by the Plan. Initially, the premiums were paid through utilization of the cash values of the previous split-dollar policies. Since the adoption of the CBS Plan, Falstaff has occasionally borrowed against the cash value of the polices purchased pursuant to the Plan to make premium payments thereunder.

13. Under the CBS Plan, life insurance in the amount of three hundred fifty thousand dollars ($350,000.00) was purchased on the life of Dependahl, four hundred thousand dollars ($400,000.00) on the life of Healy, and two hundred fifty thousand dollars ($250,000.00) on the life of Calhoun. Each Plaintiff executed a separate Death Benefit Agreement with Falstaff in accordance with this Plan.

14. Plaintiffs played no significant roles in the adoption of the Severence Policy or the CBS Plan.

15. Falstaff's initial contact with Kalmanovitz came in the fall of 1974. At that time an agreement was worked out whereby Kalmanovitz's General Brewing Company purchased Falstaff's San Francisco Brewery and contracted to produce beer for Falstaff on the West Coast. At that time, Kalmanovitz indicated an interest in investing in Falstaff in the future.

16. Later in the fall of 1974 Falstaff was experiencing severe financial problems. In its search for an infusion of new capital, Kalmanovitz was contacted. A series of meetings between Kalmanovitz and Falstaff executives culminated in an agreement dated March 10, 1975 whereby Kalmanovitz, in return for voting control of Falstaff, would invest ten million dollars ($10,000,000.00) in Falstaff preferred stock, and would personally guarantee ten million dollars ($10,000,000.00) of Falstaff's debts. This agreement quite likely saved Falstaff from financial collapse.

17. Negotiating on behalf of Falstaff were Ferindand Gutting, Arthur Tonna, and James McClellan. Plaintiffs had no contact with Kalmanovitz or his representatives during the course of the negotiations.

18. During the course of the negotiations Kalmanovitz represented to the Falstaff negotiators, in general terms, that he was satisfied with the basic opera-

tions of Falstaff and that no drastic changes would be made. He further stated that he would be involved only in major policy decisions and not the day-to-day operations of Falstaff. These statements were clearly false when made, as Kalmanovitz intended from the very beginning to run Falstaff as his personal fiefdom and drastically alter its operations. However, though Kalmanovitz told Gutting that Gutting would be retained, there is no evidence that Kalmanovitz ever stated that Plaintiffs would be retained after the takeover.

19. The agreement with Kalmanovitz called for the issuance of a new series of preferred stock. To consummate this agreement, the Articles of Incorporation had to be amended with stockholder approval. A stockholders' meeting was held on April 28, 1975, at which time the Kalmanovitz deal was approved by the stockholders.

20. Prior to this meeting, Dependahl and Healy made extensive efforts to rally

support for the agreement among the stockholders. Due to the importance of the agreement and the shortness of time prior to the meeting, the efforts made by Dependahl and Healy were more extensive and concentrated than usual. These efforts were expended by these Plaintiffs while acting under the mistaken, although understandable, assumption that they would be retained after Kalmanovitz took over.

21. Dependahl first met Kalmanovitz at a dinner meeting on April 27, 1975. At this meeting, Kalmanovitz discussed several items with Dependahl. Kalmanovitz was unimpressed with Dependahl's knowledge of the legal and marketing aspects of beer sales, and was unhappy with Dependahl's independence of ideas and refusal to blindly agree to all Kalmanovitz said. Kalmanovitz decided to terminate Dependahl at this time.

22. After this dinner meeting, while discussing with Tonna the possibility of firing a large number of Falstaff employees,

Kalmanovitz was first made aware of the existence of the Severance Policy. Even though it was late at night, he ordered that he immediately be shown a copy of the Policy. The next morning Kalmanovitz inquired of McClellan, Falstaff's counsel, whether the Policy was legally binding and enforceable, and whether it could be terminated. He was advised that it was binding and enforceable.

23. Healy first met Kalmanovitz at the meeting of the Falstaff Board of Directors which followed the stockholders' meeting of April 28, 1975. At that meeting, Healy gave a lengthy report on the financial condition of the company. Kalmanovitz was unimpressed with Healy's presentation, and dissatisfied with Healy's inability to immediately respond to Kalmanovitz's unreasonable demand to know the cash position of the company at that time. As with Dependahl, Kalmanovitz determined to terminate Healy on the basis of this first impression.

24. Upon consummation of the agreement between Kalmanovitz and Falstaff, Kalmanovitz immediately took over day-to-day operations of the company. On May 1, 1975, Dependahl and Healy, along with other executives, were discharged by Tonna on Kalmanovitz's orders. At the time of their discharge, Dependahl and Healy were informed that they would receive the maximum twenty-six weeks' of severance pay. They received four weeks' severance pay but payments were then stopped.

25. Dependahl and Healy were not discharged due to inadequate performance of their duties or for any other "cause". Quite simply, they were discharged due to a change in ownership and management and consequent change in policies and personnel.

26. After Healy's discharge, Calhoun took over the positions of Secretary and Treasurer. In these positions, as well as his retained position of Comptroller, Calhoun was charged by Kalmanovitz with the

responsibility of changing the accounting system from the centralized, computerized system then in use by Falstaff to a decentralized, manual system similar to those utilized in many of Kalmanovitz's other brewery operations. Calhoun's efforts to accomplish this change did not meet with Kalmanovitz's approval. Kalmanovitz wanted the change accomplished rapidly, but Calhoun proceeded with the caution to be expected in the face of such a major corporate change.

27. Kalmanovitz's dissatisfaction with Calhoun was further magnified due to an incident involving deferral of current debts by Continental Can. Continental Can, upon personal guarantee of the debt by Kalmanovitz and his wife, agreed to a one hundred twenty day deferral of current debts. This debt amounted to approximately eleven million dollars ($11,000,000.00), which was ultimately represented by a note executed by Falstaff in mid-August, 1975. Prior to the execution of the note, however, Kalmanovitz

requested Calhoun to list the debt as a long-term liability rather than a short-term debt. Without such a change, Falstaff risked default on debts to various lenders, due to conditions in the mortgages regarding current assets-current liabilities ratios. Calhoun resisted the change, maintaining that such a change was improper without an executed note. Again, this Court must believe that Calhoun's response to Kalmanovitz's demand was proper and ethical.

28. Calhoun was discharged by Tonna upon Kalmanovitz's orders on August 8, 1975. The reasons assigned for the discharge were Calhoun's actions with respect to the decentralization project and the Continental Can transaction. These reasons came into play to some extent, but the overriding consideration for Calhoun's discharge was, similar to the discharges of Dependahl and Healy, a change in management and a preplanned change in personnel. Kalmanovitz

gave Calhoun only the slightest chance to fit into the new management scheme, and when he did not fit in he was discharged. As with Kalmanovitz's first impression of Dependahl, Calhoun's insistence upon ethics and caution conflicted with Kalmanovitz's desire that his subordinates blindly follow his orders, regardless of their correctness or propriety. There is no evidence to support Calhoun's assertion that he was discharged to prevent the vesting of his pension benefits.

29. Since Calhoun had not been employed by Falstaff for fifteen years, as required by the Severance Policy as amended in June, 1975, he did not receive any severance pay from Falstaff.

30. Subsequent to the dismissal of Healy and Dependahl, Kalmanovitz maliciously, unfairly, and without any justification whatsoever directed that severance payments to them be stopped. Falstaff subsequently offered to Dependahl and Healy to resume

severance payments if they would waive their interests in the CBS Plan. Dependahl and Healy refused to do so, and the severance payments were never resumed.

31. Falstaff and Kalmanovitz have consistently maintained throughout this litigation and others that the CBS Plan is not valid and binding with the respect to Plaintiffs. This contention is based to a large extent on various allegations of impropriety and misconduct charged to Plaintiffs, which allegations have been stricken from this case due to Defendants' failure to comply with discovery requests concerning these matters. See Order of December 10, 1979. ____ F. Supp. ____. In any event, this Court has serious doubts as to the bona fides of these contentions. In fact, Kalmanovitz has consistently sought to complicate this lawsuit at every chance and to delay its progress by every means possible. Clearly, these actions, as well as Kalmanovitz's original decision not to honor the

CBS Plan, have been taken in an effort to force Plaintiffs into submission, and in willful and wanton disregard of Plaintiffs' rights.

32. Kalmanovitz was acting at all times relevent to this litigation in what he perceived to be the interest of Falstaff, and not on his own behalf. It is also apparent, however, that Kalmanovitz firmly believes that what's good for "Mr. Paul" is good for Falstaff.

33. Falstaff and Kalmanovitz exercise control over the management of the Severance Policy and CBS Plan and the disposition of any assets included therein.

CONCLUSIONS OF LAW

This Court has jurisdiction of this case pursuant to 29 U.S.C. §1132(e)(1), and 28 U.S.C. §1332. This case involves Plaintiffs' efforts to define and enforce their rights in plans allegedly covered by the Employee Retirement Income Security

Act of 1974 (ERISA), 29 U.S.C. §§1001 to 1144, as well as several common law counts between citizens of different states involving more than ten thousand dollars ($10,000.00).

Before proceeding to a discussion of the merits of the various counts in this action, This Court must discuss the effect to be given to numerous "admissions" on the part of Defendants, which Plaintiffs have placed into evidence in this case. These admissions cover every substantive element of Plaintiffs' causes of action, and were these admissions given full force and effect a trial would have been totally redundant and cumulative.

Plaintiffs initially filed the request for admissions on February 28, 1978, and a response was therefore due on March 30 of that year. Prior to that date, however, Plaintiffs raised the issue of a purported settlement. A hearing was held on Plaintiffs' motion to enforce that settlment on April

10, 1978, and the settlement was enforced by this Court on April 18, 1978. 448 F. Supp. 813. During the pendency of an appeal of that order, Plaintiffs abandoned their efforts and the settlement was vacated on February 26, 1979. 594 F2d 869.

Though no formal stay of proceedings was entered during the course of the litigation of the "settlement" question, the parties ceased all discovery efforts. On March 9, 1979, shortly after the Eighth Circuit's remand, Defendants lodged their answers to Plaintiffs' requests for admissions with this Court. On June 5, 1979, Defendants were granted leave to file those responses.

Plaintiffs now assert that the admissions are conclusive against Defendants due to Defendants' failure to file a motion to withdraw their "admissions", pursuant to Rule 36(b), Federal Rules of Civil Procedure. These "admissions" allegedly arose from Defendants' failure to deny the requests within thirty days. See Rule 36(a),

Federal Rules of Civil Procedure. This Court will not give such conclusive weight to the admissions.

Plaintiffs have been fully aware throughout the course of this litigation that Defendants denied the substance of the admissions. The admissions go to the very heart of Plaintiffs' claims, which claims were fully denied in Defendants' answers to the complaint. Furthermore, Defendants responded to this same set of admissions in a companion case now pending before a different judge in this district. After the filing of Defendants' response in this case, Plaintiffs gave no indication that they considered the matters admitted due to a lack of appropriate motion. Defendants' failure to timely deny is undoubtedly attributable in large part to Plaintiffs' effort to enforce the settlement, and subsequent abandonment of that effort.

Under these circumstances it would be extremely unfair[1/] to allow Plaintiffs to prove the bulk of their case through these contested admissions. Though Defendants never filed a formal motion to withdraw their "admissions", their denial has been obvious throughout this litigation. Furthermore, Plaintiffs, despite any reliance on the admissions, placed into evidence that proof which they could garner to support their case, and the issues covered by the admissions were fully litigated. This Court has, therefore, considered the admissions as evidence in this case, but has not considered the matters included therein as conclusively established against Defendants. Warren v. International Broth. of Teamsters, Inc.,

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1/ This Court must concede, however, that it is with some reluctance that it concludes that Defendants are entitled to any measure of equity in light of their conduct throughout this litigation.

544 F.2d 334 (8th Cir. 1976); Pleasant Hill Bank v. United States of America, 60 F.R.D. 1 (W.D. Mo. 1973).

THE CBS PLAN

Counts I and II of both complaints seek declaratory and injunctive relief with respect to the CBS Plan. The initial issue to be decided is whether the Plan does, in fact, fall within the coverage of ERISA as Plaintiffs claim. Defendants raise numerous arguments as to why the Plan does not fall within ERISA, but this Court must conclude that those arguments are without merit.

ERISA applies to any employee benefit plan established or maintained by an employer engaged in commerce. §4 of ERISA, 29 U.S.C. §1003. An "employee benefit plan" is an employee welfare benefit plan or an employee pension benefit plan, or a plan that is both an employee welfare benefit plan and an employee pension benefit plan.

$3(3) of ERISA, 29 U.S.C. $1002(3).

Section 3(1) of ERISA, 29 U.S.C. $1002(1), defines an "employee welfare benefit plan" to include

> ...any plan... which was heretofore or is hereafter established or maintained by an employer ... to the extent that such plan ... was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) ... benefits in the event of death ... .

There can be no doubt that the CBS Plan was established by Falstaff to provide, through the purchase of insurance, benefits to the participants' beneficiaries upon the participants' death. The CBS Plan is clearly an employee welfare benefit plan as defined in ERISA.

Plaintiffs also argue that the CBS Plan qualifies as an employee pension benefit plan, as that term is defined in Section 3(2) of the Act. 29 U.S.C. 1002(2). Though this Court has serious doubts as to the validity of this contention, this issue

need not be decided at this time. CBS Plan is covered by ERISA due to its status as an employee welfare benefit plan, and its also being considered an employee pension benefit plan would not change the outcome of this case.

Defendants argue initially, however, that the CBS Plan is merely a series of individual agreements and not a "plan". This argument is specious. The CBS Plan was adopted by Falstaff as a unitary scheme for participation by all covered executives. Falstaff did not devise an individual death benefit agreement each time it decided that an executive should be covered. In a similar vein, Defendants argue that the CBS Plan is not within ERISA because there is no single written document embodying the Plan, as required by Section 402 of the Act. 29 U.S.C. 1102(a)(1). Defendants miss the point. If the CBS Plan falls within ERISA, as this Court concludes that

it does, defendants may not avoid the requirements of that Act by merely failing to comply and then arguing that the Plan is not within the Act due to their non-compliance.

Defendants next argue that the CBS Plan is excluded from ERISA coverage as an unfunded excess benefit plan, pursuant to $S^{4}(b)(5)$ of ERISA. 29 U.S.C. $S1003(b)(5)$. Defendants claim that the CBS Plan is an excess benefit plan since the employees are already covered by the Falstaff Pension Plan. This simplistic argument is without merit. Whether a plan is an "excess benefit plan" as defined by ERISA is determined by whether the benefits and contributions are in excess of those allowed by the Internal Revenue Code. 29 U.S.C. $S1002(36)$. Neither party has attempted to unravel the maze of the Internal Revenue Code, and this Court likewise finds it unnecessary to do so, for it is clear that the CBS Plan is not unfunded.

The CBS Plan is financed through the purchase of insurance policies on the lives of the key executives covered. Though ERISA does not define "unfunded", this Court must conclude that the instant plan is "funded" within the meaning of that statute. Guidance is supplied by the applicable regulations.

Section 104(a) (3) allows the Secretary of Labor, by regulation, to exempt certain employee welfare benefit plans from the reporting and disclosure requirements of the Act. 29 U.S.C. §1024(a)(3). Pursuant to this authority, the Secretary has promulgated a regulation which applies directly to plans such as the CBS Plan. 29 C.F.R. §2520.104-24 specifically exempts from the reporting and disclosure requirements employee welfare benefits plans which are maintained by the employer primarily for the purpose of providing benefits to a select group of management

and for which benefits are provided exclusively through insurance policies, the premiums for which are paid directly from the employer's general assets. The CBS Plan fits squarely within this exemption. The fact that the CBS Plan is exempted from this part of ERISA necessarily implies that it is otherwise included within the Act's coverage.

This regulation, along with others, also seems to equate "unfunded" with payment of benefits from the employer's general assets. See also, for example, 29 C.F.R. §2520.104-20. This correlation is entirely reasonable. In the case of the CBS Plan, for example, the benefits will eventually be paid through the insurance contracts purchased and maintained by payments by Falstaff. Through these payments Falstaff has allowed the insurance companies to accumulate a fund for the eventual payment of benefits. This Court must conclude,

therefore, that the CBS Plan is not an unfunded excess benefit plan exempt from ERISA.

Lastly, Defendants argue that ERISA does not apply to "key man" plans such as the CBS Plan. There is no support in the statute for this conclusion. Though unfunded key man plans are excluded from various parts of the Act, 29 U.S.C. §§1051(2), 1081(3), and 1101(a)(1), there is no exclusion from ERISA in general for such plans. In any event, the CBS Plan is not unfunded.

Plaintiffs seek declaratory and injunctive relief with respect to the CBS Plan. Section 502 of ERISA permits a participant in a covered plan to bring a civil suit to clarify his rights to future benefits in the plan and to enjoin any act which violates the terms of ERISA or the plan. 29 U.S.C. §1132(a)(1)(B) and (a)(3)(A). Plaintiffs have clearly shown

that the CBS Plan is covered by ERISA and that it is binding and enforceable. They have also shown that they were not discharged due to failure to perform assigned duties with reasonable skill and diligence, gross misconduct, or conviction of a felony. Furthermore, defendants have indicated a desire and intent to terminate the Plan unless enjoined from doing so. Appropriate declaratory and injunctive relief to prevent termination of the Plan and to keep the Plan in full force and effect will therefore be granted. Both Falstaff and Kalmanovitz are fiduciaries with respect to the CBS Plan, 29 U.S.C. §1002(21), and the declaratory and injunctive relief will therefore be directed toward each of them.

Plaintiffs also seek various other forms of injunctive relief. As to the majority of these requests, this Court believes that such relief is not appropriate. The relief which will be granted will fully protect Plaintiffs' interest in the Plan, thereby

rendering portions of the relief requested unnecessary. As to other portions, Plaintiffs have failed to prove the alleged violations of ERISA, or have failed to show the necessity of injunctive relief.

Plaintiffs have shown, however, that Defendants have borrowed money from the CBS Plan in the past, and, unless enjoined, are likely to do so in the future. Such borrowings violate the fiduciary responsibilities of ERISA. Section 406 prohibits the lending of money between a plan and a party in interest. 29 U.S.C. §1106(a)(1)(B). Defendants are clearly parties in interest. 29 U.S.C. §1002(14). Such borrowings will therefore be enjoined.

THE SEVERANCE POLICY

This Court has previously ruled that the Severance Policy is an employee welfare benefit plan within the coverage of ERISA, 478 F.Supp. 359, and, despite Defendants' continued arguments to the contrary, that

conclusion will not be changed. Section 3 of ERISA specifically includes within the coverage of ERISA plans which provide the benefits described in 29 U.S.C. §186(c). 29 U.S.C. §1002(1)(B). That section, in turn, specifies severance pay as one of the enumerated benefits. See, also, 29 C. F.R. 2510.3-1(a)(3). Furthermore, in Donnelly v. Aetna Life Ins. Co., 465 F. Supp. 696 (E.D.Pa. 1979), a severance pay plan set out in the employer's Personnel Policy Manual, similar to that involved in this case, was held to be an employee welfare benefit plan within the coverage of ERISA. The Falstaff Severance Policy is clearly covered by ERISA.

Plaintiffs Dependahl and Healy seek to recover, pursuant to 29 U.S.C. §1132(a)(1)(B), the nineteen thousand seven hundred fifty dollars ($19,750.00) still owing under the Severance Policy. This amount represents the twenty-two weeks' pay withheld by Defendant Falstaff. Plaintiffs

Dependahl and Healy are clearly each entitled to this amount according to the terms of the Severance Policy in effect at the time of their discharge, and judgement will accordingly be entered. They were discharged due to a change in management and personnel, not because of any "cause" which would discharge Falstaff's liability under the Policy.

A different situation is presented, however, with respect to Plaintiff Calhoun. Prior to his discharge, Falstaff's Severance Policy was changed. At the time of his discharge, the Policy provided that employees terminated prior to fifteen years employment with Falstaff were not entitled to severance pay. This change was made, however, in contemplation of the mass firings eventually carried out by Falstaff.

Such a change in the Policy is a clear violation of Falstaff's responsibility to discharge its duty as fiduciary in the sole interest of beneficiaries and for the

exclusive purpose of providing benefits to beneficiaries and defraying reasonable expenses. 29 U.S.C. 1104(a)(1); 478 F.Supp. at 360-361. Falstaff's alteration of the Policy was for Falstaff's benefit alone. Such a change will not be permitted to divest plaintiff Calhoun of his otherwise entitled benefits.

This decision does not mean that an employer may never cut back on benefits previously provided to employees. This Court merely holds that such a change is not permissible when made expressly in contemplation of actions which would otherwise entitle employees to the previously provided benefits.

Plaintiff Calhoun will therefore be awarded the amount he would received were it not for the change in the Policy. That amount is nine weeks' pay, or five thousand

five hundred thirty-four dollars ($5,534.00).[2/] As with plaintiffs Dependahl and Healy, Calhoun was not discharged for any reason which would justify Falstaff's withholding of severance pay.

Plaintiffs are also entitled to pre-judgement interest on these amounts. The Severance Policy was a contract to pay a fixed amount of money at a certain date, the breach of which entitles Plaintiffs to recovery of the principal amount, plus interest from the date of the breach. Royal Indemnity Co. v United States, 313 U.S. 289 (1941); Sebree v Rosen, 374 S.W. 2d 132 (Mo. 1964); §408.020 R.S.Mo. (1979). As to Plaintiff Calhoun, the interest shall

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2/ Plaintiff Calhoun seeks essentially this same relief in Count IV of his complaint, under the theory that Defendants breached their fiduciary duty with respect to the Policy. As judgement will be entered in Plaintiff Calhoun's favor on Count III of his complaint, Count IV is superfluous and judgement will be entered in defendants' favor on that count.

run from August 8, 1975, the date of his dismissal and denial of benefits. As to plaintiffs Dependahl and Healy, the interest shall run from June 4, 1975, the date on which Kalmanovitz and Falstaff informed these Plaintiffs that the payments were terminated. A rate of nine percent (9%) will be allowed. §408.020 R.S. Mo. (1979).

OTHER CLAIMS

A. Plaintiff Calhoun seeks extensive declaratory and injunctive relief, with respect to the Pension Plan, as well as damages for Defendants' action with respect to the Plan. Calhoun claims that he was discharged solely to prevent the vesting of his pension benefits. Were that so, the relief requested might well be appropriate. 478 F.Supp. at 359-360. Section 510 of ERISA prohibits the discharge of any employee to prevent the attainment of any rights to which the employee may become entitled. 29 U.S.C. §1140.

In order to sustain his cause of action, however, Calhoun must carry the burden of proving that he was discharged to prevent the vesting of his pension benefits. Moore v. Home Ins. Co., 601 F.2d 1072 (9th Cir. 1979). He has failed to do so. Judgement will be entered for Defendants on Counts VI, VII, and VIII of Calhoun's complaint.

B. Plaintiffs Dependahl and Healy also seek damages for Defendants' alleged violation of Section 510 of ERISA. As to the majority of the relief requested, Plaintiffs' prevailing as to the Severance Policy and CBS Plan eliminates any damage. In any event, this Court does not believe that Defendants have violated Section 510 with respect to Plaintiffs Dependahl and Healy.

It is true that Defendants have refused to pay benefits to which these Plaintiffs are entitled, and have refused to recognize the validity of the CBS Plan.

Plaintiffs' appropriate course of action for such refusals lies in Section 502 of ERISA, which allows them to sue to enforce the plans or the Act, to recover benefits which are owing, or to obtain a declaration as to their rights in the plans. 29 U.S.C. §1132.

Section 510 of ERISA is directed to an entirely different problem. That section prohibits actions taken against a plan participant or beneficiary in retaliation for that person's exercising any rights under the Act or the plan, or to interfere with the attainment of any rights to which the person may become entitled. There is no evidence that Defendants have taken any such actions with respect to Plaintiffs. Defendants have refused to pay benefits to which Plaintiffs are entitled; they have not interfered with the attainment of any rights or retaliated against Plaintiffs due to their exercise of any rights. Judgement will therefore be entered for

defendants on Count IV of Plaintiffs Dependahl's and Healy's complaint.

C. Plaintiffs seek substantial actual and punitive damages from Kalmanovitz for his alleged tortious interference with their contractual relations with Falstaff. Plaintiffs allege that Kalmanovitz is liable under this theory due to his obstruction of Falstaff's relations with Plaintiffs with respect to the plans at issue in this case.

The elements of such a cause of action are well settled in Missouri. In order to prevail, Plaintiffs must prove five elements:

> (1) A contract or valid business relationship or expectancy (not necessarily a contract);
> (2) Defendant's knowledge of the contract or relationship.
> (3) Intentional interference by the Defendant inducing or causing a breach of the relationship;
> (4) The absence of justification; and,
> (5) Damages resulting from Defendant's conduct.

Solomon v. Crown Life Ins. Co., 536 F.2d 1233, 1238 (8th Cir.) cert. denied, 429 U.S. 961 (1976); Francis Chevrolet Co. v General Motors Corp., 602 F.2d 227, 230

(8th Cir. 1979). It is clear that all the above elements are met in this case. This Court has found that the Severance Policy and CBS Plan were valid and enforceable contracts between Plaintiffs and Falstaff. Kalmanovitz obviously knew of these contracts. The refusal of Falstaff to honor them was at the express direction of Kalmanovitz. This Court has found that Kalmanovitz had no justification for directing Falstaff to breach the contract. Lastly, it is clear that Plaintiffs lost benefits to which they were entitled due to Kalmanovitz's actions.

Kalmanovitz, however, was acting at all times in his capacity as controlling shareholder of Falstaff. As such, he was privileged to induce a breach of the contracts in question, "provided that no improper means are used, the Defendant acts in good faith to protect the corporation and does not act for his own personal benefit". Nola v. Merollis Chevrolet

Kansas City, Inc., 537 S.W. 2d 627, 634 (Mo. App. 1976). This Court cannot conclude that Kalmanovitz was acting in good faith. His actions were taken maliciously and unjustifiably. Throughout this litigation, Kalmanovitz has shown nothing but contempt for the welfare and rights of Plaintiffs, as well as for the normal rules of procedure and ethics in this Court. See Order of December 10, 1979. _____F.Supp._____. After living with these cases for over four years, this Court is left with the definite and firm conviction that Kalmanovitz enjoys the hardships he has forced upon Plaintiffs. Due to this lack of good faith, Kalmanovitz forfeits his privilege to induce Falstaff to breach the contracts in question.

Plaintiffs have clearly been damaged due to the loss of benefits to which they were entitled. Through this Court's decision on other counts of these cases, however, Plaintiffs' actual damages have

been eliminated. Kalmanovitz's bad faith and malicious intent justify the imposition of substantial punitive damages in these actions. Judgement will be entered in the amount of fifty thousand dollars ($50,000.00) for each Plaintiff against Kalmanovitz as punitive damages on Count IX of Calhoun's complaint and Count V of Dependahl's and Healy's complaint.

D. Plaintiffs Dependahl and Healy seek substantial actual and punitive damages for Kalmanovitz's alleged fraudulent misrepresentations during the negotiations leading up to his purchase of controlling interest in Falstaff. This claim arises from Kalmanovitz's alleged misrepresentations as to his intent to retain Dependahl and Healy after the takeover. This Court has found that no such representations were made. Judgement will therefore be entered for Kalmanovitz on Count VI of Dependahl's and Healy's complaint.

E. Finally, consideration of Plaintiffs' request for attorneys' fees will be deferred until after an appropriate hearing. As prevailing parties, they are entitled to fees pursuant to Section 502(g) of ERISA. 29 U.S.C. §1132(g). The calculation of attorneys' fees in this action will be more complicated than usual due to the inter-relationship of this case with others brought by similarly situated individuals, the complicated nature of this suit, and the complex proceedings it engendered. It is clear, however, that many hours of legal work were required of Plaintiffs' attorneys because of Defendants' uncooperativeness and recalitrance. This aspect of these proceedings will, of course, be fully considered when attorneys' fees are awarded herein.

John F. Nangle
UNITED STATES DISTRICT JUDGE

Dated: June 9, 1980.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CHARLES DEPENDAHL, et al., Plaintiffs, vs FALSTAFF BREWING CORPORATION, et al., Defendants.	NO. 75-701C(2)
JOHN C. CALHOUN, Plaintiff, vs FALSTAFF BREWING CORPORATION, et al., Defendants.	NO. 76-24C(2)

MEMORANDUM

This case is now before the Court on the issue of Plaintiffs' application for attorneys' fees. Plaintiffs brought these suits alleging violations of the Employee Retirement Income Security Act of 1974 ("ERISA:), 29 U.S.C. §1132, as well as several common law counts. After a trial before this Court sitting without a jury,

Plaintiffs were awarded substantial equitable and monetary relief. See Order and Memorandum of June 9, 1980.

This case was referred to the Honorable David D. Noce, United States Magistrate, for an initial evidentiary hearing on this application. This Court has considered the record developed before him, his report and recommendation, and the parties' objections thereto. The following shall constitute this Court's findings of fact and conclusions of law on the issue of attorneys' fees.

Under §502(g) of ERISA, 29 U.S.A. §1132(g), the Court may, in its discretion, allow a reasonable attorneys' fee to the prevailing party. Such an award is unquestionably warranted in this case. Furthermore, Plaintiffs are also entitled to an award of attorneys' fees for all efforts expended in attempts to obtain answers to interrogatories, pursuant to this Court's Order of December 10, 1979.

The Fifth Circuit Court of Appeals enumerated various factors which are relevent to an award of attorneys' fees in Johnson v. Georgia Highway Express, Inc., 448 F.2d 714 (5th Cir. 1974). These factors have been adopted by the Eighth Circuit in the civil rights context, Crain v. City of Mountain Home, Ark., 611 F.2d 726 (6th Cir. 1979), in Title VII cases, Allen v. Amalgamated Transit Union, 554 F.2d 876 (8th Cir. 1977), and in age discrimination cases, Cleverly v. Western Electric Co., Inc., 594 F.2d 638 (8th Cir. 1979). This Court also believes these factors are appropriately considered in the context of an ERISA case, Carter v Montgomery Ward & Co., 76 F.R.D. 565 (E.D. Tenn. 1977). Under the Johnson analysis, the award should generally not be less than the reasonable number of hours worked times a reasonable hourly fee. Zoll v Eastern Allamakee Community Sch. Dist., 588 F.2d 246 (8th Cir. 1978); Cleverly, supra.

This litigation has now consumed well over four years, and Plaintiffs' attorneys have expended an enormous amount of time on it. Defendants object to numerous portions of the time spent, but this Court cannot conclude that the time for which compensation is now sought was not reasonably spent. The small proportion of this time which related to other litigations concerning the same facts as these cases need not be excluded. These efforts in following related litigations were not unreasonably expended - plaintiffs' attorneys could not be expected to divorce themselves from related litigations involving plaintiffs, the outcome of which could substantially affect the instant litigations.

Likewise, Plaintiffs' attorneys are entitled to compensation for all time reasonably spent in pursuit of the results ultimately achieved. Brown v. Bathke, 588 F.2d 634 (8th Cir. 1978), Crain, supra.

This Court need not make an artificial distribution of the attorneys' time between successful and unsuccessful claims, or between Plaintiffs' claims and defendants' counterclaim. All these various issues are ultimately interrelated, and work on any issues necessarily benefits the resolution of the others.

Finally, this Court believes that Plaintiffs' attorneys are entitled to compensation for work done by paralegals and interns on these cases. Sherrill v. J. P. Stevens & Co., Inc., 441 F.Supp. 846 (W.D.N.C. 1977), aff'd 594 F.2d 858 (4th Cir. 1978); Phillips v. Moore, 441 F.Supp. 833 (W.D.N.C. 1977); Francia v. White, 594 F.2d 778 (10th Cir. 1978); Comm. of Pennsylvania v. O'Neill, 424 F. Supp. 1382 (N.D.Miss. 1976). Were this work not done by paralegals and interns, the time of attorneys would have been necessary.

In light of these rulings, this Court thereby finds the reasonable number of hours

expended by Plaintiffs' attorneys to be as follows: [1/] Carroll J. Donohue, three hundred twenty-five hours; Harry B. Wilson, two thousand two hundred fifty hours; Mark G. Arnold, three hundred hours; other attorneys, fifty hours; paralegals, one hundred eighty hours; and interns, eighty hours. In addition to the actual time expended, this Court has considered the novelty and difficulty of the issues presented, the problems caused by opposing parties and counsel, and the complex factual investigation necessary to a proper presentation of the issues raised.

In light of the skill necessary to properly present these cases, the experience, reputation and ability of Plaintiffs' attorneys, those attorneys' customary fees,

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1/ In this area, the finding of a "reasonable" number of hours is necessarily highly subjective. This Court has therefore supplied rounded-off figures. Attempting to make a finding as accurate as tenths of hours, as Plaintiffs' attorneys request, is both illogical and misleading in light of the highly subjective nature of this inquiry.

awards in other cases and the length of time Plaintiffs' attorneys have handled these cases, this Court finds a reasonable hourly fee for plaintiffs' attorneys to be as follows: Donohue, eighty-five dollars per hour; Wilson, forty-five dollars per hour; Arnold, forty-two dollars per hour; other attorneys, fifty dollars per hour; paralegals, twenty dollars per hour; and interns, twenty dollars per hour. Also weighing heavily in this determination is Defendants' assent to these hourly rates.

This Court does not believe that an enhancement of this fee is called for in the instant case. Though an unusually large amount of time was necessarily spent, Plaintiffs' attorneys are fully compensated for this factor by the large number of hours for which compensation will be awarded. No other factors are present in this case such that enhancement is called for.

Finally, Plaintiffs' attorneys will be awarded thirteen thousand dollars to

cover litigation expenses. These expenses include copying costs, travel expenses and various other expenses. This Court believes this amount was reasonably spent by Plaintiffs' attorneys in these litigations. This figure, as was the figure for the time reasonably spent, is highly subjective. This conclusion was reached after considering numerous factors, including the actual expenses, the necessity of the expenses, and the reasonable cost for the services or goods purchased.

Plaintiffs' attorneys will therefore be awarded attorneys' fees of one hundred forty-nine thousand one hundred seventy-five dollars ($149,1975.00), and litigation expenses of thirteen thousand dollars ($13,000.00).

John F. Nangle
UNITED STATES DISTRICT JUDGE

Dated: August 28, 1980.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Charles Dependahl, John Calhoun and William Healy,	)	
	)	No. 79-2050
Appellees,	)	
v	)	
	)	
Falstaff Brewing Corporation, and Paul Kalmanovitz,	)	
	)	
Appellants.	)	

Appeal from the U.S. District Court
for the Eastern District of Missouri

Submitted: March 11, 1981

Filed: June 30, 1981

GIBSON, Senior Circuit Judge.

This appeal concerns federal issues arising under the Employees Retirement Income Security Act, 29 U.S.C. S 1001 et seq. (1976) (ERISA), together with pendent state claims for tortious interference and faud. Falstaff Brewing Corporation and Paul Kalmanovitz, controlling shareholder of Falstaff, appeal the district court's [1] findings that Kalmanovitz interferred with the contractual relationship between Falstaff and three former executive officers, Charles W. Dependahl, Jr., William J. Healy, and John C. Calhoun, resulting in tortious Missouri common-law and ERISA statutory violations. Falstaff and Kalmanovitz also appeal the district court's award of punitive damages, attorney fees, and prejudgement interest. Finally, Falstaff and Kalmanovitz appeal the district

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1/The Honorable John F. Nangle, United States District Judge, Eastern District of Missouri.

court's discovery sanction of dismissing their counterclaims and affirmative defenses. The former executive officers cross-appeal the district court's failure to find fraud and tortious interference by Kalmanovitz with respect to their employment contracts. With respect to the direct appeal, we affirm the district court on its findings of ERISA violations, the award of attorney fees, and the imposition of discovery sanctions. We reverse the court on its award of punitive damages and its computation of prejudgement interest. With respect to the cross-appeal, we affirm the district court.

I.

A.

In late 1974, Falstaff was experiencing severe financial difficulties. Kalmanovitz, a brewer and entrepreneur, was contacted by Falstaff, which was in need of new capital. After a series of meetings, Kalmanovitz and Falstaff signed an agreement on

March 10, 1975, whereby Kalmanovitz would purchase ten million dollars of newly issued preferred stock and would personally guarantee ten million dollars of Falstaff's debts, in return for voting control of the corporation.

In order for the deal to go through, the articles of incorporation had to be amended by the shareholders. On April 28, 1975, the stockholders met and approved the deal.

On May 1, 1975, Kalmanovitz terminated Dependahl, former vice-president and director of marketing, and Healy, former vice-president, secretary, and treasurer of Falstaff. Later, on August8, 1975, Calhoun, secretary and treasurer since May 1, was terminated by Kalmanovitz.

Prior to the terminations, these former officers appear to have been under the impression that because the takeover by Kalmanovitz was not opposed, top management would be retained. Following the

terminations, Kalmanovitz directed that severance payments to Healy and Dependahl be stopped. Falstaff subsequently made an offer to each that the severance payments would be resumed if Healy and Dependahl would waive their rights to the CBS plan, a whole-life insurance program for executives. The former executives refused and severance payments were never resumed.

Calhoun, at the time of his termination, had not been employed by Falstaff for the required period of fifteen years necessary to receive severance payments. Calhoun, therefore, did not receive any payments after his termination. The severance plan, however, had only recently been amended in June 1975 to provide for a fifteen-year employment period.

Dependahl and Healy filed suit against Falstaff and Kalmanovitz on August 8, 1975. A few months later, on January 13, 1976, Calhoun brought suit. Essentially, all

three sought both common-law and ERISA statutory relief resulting from the termination of the severance payments and alleged interference with the CBS plan. In 1977, the parties entered into a settlement agreement which was enforced, pursuant to the terminated executives' petition, by the district court. Dependahl v. Falstaff Brewing Corporation, 448 F. Supp. 813 (E.D. Mo. 1978). Pending appeal to this court, the parties both stated that they wished to try the case on its merits. This court then vacated the settlement order. Dependahl v. Falstaff Brewing Corp., 594 F.2d 869 (8th Cir. 1979).

On December 10, 1979, the district court, upon the former executives' motion, imposed discovery sanctions on Falstaff pursuant to Federal Rule of Civil Procedure 37(b). Dependahl v. Falstaff Brewing Corp., 84 F.R.D. 416 (E.D. Mo. 1979). The court struct Falstaff's affirmative defenses and

counterclaims, due to Falstaff's refusal to properly and timely respond to interrogatories. Falstaff filed a timely notice of appeal from the order. On January 10, 1980, this court granted Falstaff leave to stay its appeal until the district court entered final judgement in the case.

On December 17, 1979, trial was commenced before the Court, without a jury, and continued for six days. On February 15, 1980, after trial briefs were filed, the court took the matter under submission. On June 9, 1980, the court entered its order granting relief to the former executives on the ERISA and tortious-interference-with-contract claims, but denied relief on a fraud claim. Dependahl v Falstaff Brewing Corp., 491 F.Supp. 1188(E.D. Mo. 1980). Post-trial motions were denied by the Court on July 2, 1980.

On July 15, 1980, the district court conducted a hearing on the amount of attorney fees to be awarded the former

executives under the ERISA attorney fees statute. 29 U.S.C. S 1132(g) (1976). On August 28, 1980, the court entered its order and memorandum opinion awarding $149,1975 in attorney fees, and expenses of $13,000. Dependahl v. Falstaff Brewing Corp., 496 F. Supp. 215 (E.D. Mo. 1980).

C.

In its memorandum opinion of June 9, 1980, concerning the merits of the case, the district court found both the severance policy and the CBS plan to be within the coverage of ERISA. 491 F. Supp. at 1194, 1196. The court then concluded that Falstaff violated its fiduciary duty to Calhoun by changing the terms of the plan in contemplation of mass terminations. With respect to the CBS plan, the court enjoined Falstaff from borrowing against the cash values of the life insurance policies. Id. at 1196-97. The court awarded prejudgement interest on the severance payments at the rate of nine percent per annum.

Next, the court found Kalmanovitz liable for punitive damages in the amount of $50,000 to each former executive for tortious interference with contract involving the severance payments and the CBS plan. The trial court concluded that Kalmanovitz did not act in good faith in terminating the former executives. Accordingly, the court refused to grant Kalmanovitz any common-law privilege to induce a breach of contract. Finally, the court dismissed Dependahl's and Healy's claims that Kalmanovitz fraudulently misrepresented that they would be retained after the takeover. The court found that no misrepresentations on continuing employment were made. Id. at 1198-99.

II.

We first address the issue of whether the district court abused its discretion in ordering that Falstaff's affirmative defenses and counterclaims be stricken as a discovery

sanction pursuant to Federal Rule of Civil Procedure 37(b).[2] Falstaff argues that the trial court's sanctions were unduly harsh, given the factual circumstances surrounding the interrogatories poisted by the former

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2/Federal Rule of Civil Procedure 37(b)(2) provides:

> (2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
> (c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judge-

executives. Falstaff also contends that a Rule 37(b) sanction may be imposed only if a Rule 37(a) order is in force. In Falstaff's view, no such order was in effect. Our review of the record leads us to a different conclusion concerning the factual circumstances surrounding the discovery sanctions.

The district court's reported memorandum concerning the sanctions ample factual findings to support the imposition of sanctions. On March 27, 1978, Falstaff was ordered, pursuant to Rule 37(a), to respond

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ment by default against the disobedient party;
* * * *
In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

to the former executives' interrogatories. The settlement negotiations then intervened. See ante at 4. After the settlement was vacated, the three former executives again tried to obtain discovery. Finally, on October 11, 1979, Falstaff filed answers. These answers had been prepared a year and a half earlier. The district court concluded that

> (t)here is absolutely no excuse, however, for defendant's not having served the answers when plaintiffs renewed their request in March of 1979. To delay seven additional months during which time the answers were already prepared and ready for service is clearly inexcusable, expecially in light of the obviously incomplete and evasive nature of these answers. Defendant clearly sought to delay and obstruct plaintiffs' legitimate discovery requests, a tactic which cannot be tolerated under the voluntary scheme of discovery envisioned by the Federal Rules of Civil Procedure.
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> * * * *
>
> It is apparent to this Court that defendant has engaged in a continuous pattern of delay and obstruction. It is also apparent that this delay has been caused as much by defendant itself as by its counsel. Falstaff has

> changed counsel numerous times, each change further delaying the orderly disposition of this lawsuit. Though this Court normally does not question a litigant's desire to change counsel, when it is done as repeatedly as has defendant in this case, this Court must strongly presume that it is done more as a dilatory tactic than in a legitimate desire to engage substitute counsel.

Dependahl v. Falstaff Brewing Corp., 84 F.R.D. at 418-19.

The district court further found that the March 27, 1978, Rule 37(a) order was still in force and "carried with it the implicit condition to answer fully and completely." Id. at 419. We agree with the trial court that a Rule 37(a) order was in effect at the time the sanctions were imposed. We recognize that a Rule 37 (b) sanction should not be imposed by the trial court unless a Rule 37(a) order is in effect. See Laclede Gas Co. v. G.W. Warnecke Corp., 604 F.2d 561, 565 (8th Cir. 1979); Fisher v. Marubeni Cotton Corp., 526 F.2d 1338, 1341 (8th Cir. 1975). See generally 4A MOORE'S

FEDERAL PRACTICE 37.03(2) (2d ed. 1980). The prerequisite of a Rule 37(a) order insures that the party failing to comply with discovery is given adequate notice and an opportunity to contest the discovery sought prior to the imposition of sanctions. Here, Falstaff was apprised of its failure to comply in March 1978, over a year and a half before sanctions were imposed.

We now turn to the issue of the propriety of the scope of the district court's discovery sanctions. A Rule 37(b) sanction striking affirmative defenses and counterclaims should only be imposed in strictly limited circumstances. The Supreme Court held in Societe Internationale v. Rogers, 357 U.S. 197, 212 (1958), that Rule 37

> should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner. (Footnote omitted.)

The issue before this court is not whether we would, as an original matter, have imposed the sanctions, but rather, whether the district court abused its discretion in doing so. See National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642 (1976). The district court clearly found that Falstaff's failure to comply was due to a willful, bad-faith effort on the part of Falstaff to delay and obstruct the lawsuit. Ante at 7-8, quoting 84 F.R.D. at 418-19. The record fully supports these findings, as it demonstrates defendant's "flagrant bad faith" and "counsel's 'callous disregard' of their responsibilites." National Hockey League, 427 U.S. at 643. The district court's order of discovery sanctions against Falstaff is affirmed.

III.

A.

With regard to the merits of the case, Falstaff first argues that the CBS plan does

not fall within the coverage of ERISA. The CBS plan is a whole-life insurance plan for which Falstaff purchased insurance on approximately a dozen of its higher ranking executives. Under the terms of the plan, the named beneficiaries of a covered executive are to receive annuity income benefits upon the executive's death, with Falstaff recovering the annual premiums previously paid, with interest. The district court found the plan to be a funded employee welfare benefit plan under ERISA, 29 U.S.C. §1002(1) (1976).[3] 491 F.2d at 1194-95.

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[3] 29 U.S.C. § 1002(1) provides, in relevent part:

> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in

Falstaff argues that the CBS plan is an excess benefit plan under 29 U.S.C. §1002(36) [4] and that it is unfunded. Under 29 U.S.C. §1003(b)(5), excess benefit plans, if they are unfunded, are exempt from ERISA coverage. The district court found the CBS plan to be funded, and therefore did not reach the issue of whether the plan was an excess benefit or welfare benefit plan. 491 F. Supp. at 1195.

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in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship, or other training programs, or day care centers, scholarship funds, or prepaid legal services, * * *.

[4] 29 U.S.C. 1002(36) provides:

The term "excess benefit plan" means a plan maintained by an employer solely for the purpose of providing benefits for certain employees in excess of the limitations on contributions and benefitsimposed by section 415 of Title 26 on plans to which that section applies, without regard to whether the plan is funded. To the extent that a separable part of a plan (as determined by the Secretary of Labor) maintained by an employer is maintained for such purpose, that part shall be treated as a separate plan which is an excess benefit plan.

We agree with the district court's conclusion that the plan was funded. Funding implies the existence of a res separate from the ordinary assets of the corporation. All whole-life insurance policies which have a cash value with premiums paid in part by corporate contributions to an insurance firm are funded plans. The employee may look to a res separate from the corporation in the event the contingency occurs which triggers the liability of the plan.

B.

The major issue Falstaff argues on appeal is whether the district court erred in finding Kalmanovitz liable for tortious interference with the severance policy and CBS plans under Missouri common law. Falstaff contends that ERISA preempts a state common-law tortious interference with contract cause of action with regard to ERISA pension and welfare benefit plans.

ERISA preempts state laws to the extent that they relate to employee benefits which are not exempt from federal regulation. See Alessi v. Raybestos-Manhattan, Inc., ____ U.S. ____, _____, 49 U.S.L.W. 4503, 4507 (May 19, 1981). 29 U.S.C. §1144 (1976) provides in pertinent part:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.
>
> * * * *
>
> (c) For purposes of this section:
> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

The Supreme Court recently has stated the criteria to be followed by a reviewing court in determining whether a state law is preempted by federal legislation. In

Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co., ____ U.S. ____, ____, 49 U.S.L.W. 4232, 4233 (March 10, 1981), the Court stated:

> (W)hen Congress has chosen to legislatte pursuant to its constitutional powers, then a court must find local law pre-empted by federal regulation whenever the 'challenged state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."' Perez v. Campbell, 402 U.S. 637, 649 (1971), quoting Hines v. Davidowitz, supra, at 67-68. Making this determination 'is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict.' Perez v. Campbell, supra, at 644. And in deciding whether any conflict is present, a court's concernis necessarily with 'the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted.' San Diego Building Trades Council v. Garmon, supra, at 243.

Congress has explicitly set forth the broad remedial policy of ERISA. 29 U.S.C. §1001(b) (1976) provides:

> It is hereby declared to be the policy of this Act to protect inter-state commerce and the interests of participants in employee benefit plans

> and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

Congress therefore saw a need to set minimum, uniform national standards for employee benefit plans and to provide for uniform remedies in the enforcement of the plans. In doing so, Congress preempted all state laws which relate to employee benefit plans, not only state laws which directly attempt to regulate an area expressly covered by ERISA. Wadsworth v. Whaland, 562 F.2d 70, 77 (1st Cir. 1977) (Lay, J.), cert. denied, 435 U.S. 980 (1978). Congress "meant to establish pension plan regulation as exclusively a federal concern," limited only by the terms of ERISA itself. Alessi v. Raybestos-Manhattan, Inc., ___U.S. at ____, 49 U.S.L.W. at 4508 (footnote omitted).

Although preemption is not lightly

inferred, the broad scope of the substantive provisions of ERISA, combined with the explicit statement of federal preemption in section 1144, leads us to conclude that Congress intended to "occupy the field" of employee benefit plans. Conflicts between federal and state regulatory provisions may have one of two sources, "either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained (occupation of the field)." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963). The first type of conflict involves a direct interference by the state law in its actual operation with the substantive policies underlying the federal legislation. The second type involves the congressional veto of state laws in areas within Congress's commerce clause powers. See generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW §6-25 (1978). We conclude that Congress legislated an ouster of all state

laws relating to employee benefit plans, given the "unambiguous congressional mandate to that effect" contained in section 1144. Florida Lime & Avocado Growers, Inc., 373 U.S. at 147. See generally Hutchinson and Ifshin, Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974, 46 U. CHI. L. REV. 23, 38-43 (1978).

The thrust of the former executives' argument against federal preemption of the state tortious interference with contract cause of action focuses on the lack of substantial damage such a cause of action would have on the overall purpose of ERISA. This argument, however, misses the point. If Congress has already provided a remedy for the violation of the former executives' benefit plans, then once Congress has expressed its intention to occupy the field, the state law is preempted, regardless of whether or not a conflict exists which involves a direct interference by the State

law with the substantive federal legislation. Here, Congress has provided a remedy for the wrong allegedly done the former executives by Kalmanovitz. 29 U.S.C. §1149 (1976) provides, in relevent part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. * * * The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

Congress as preempted state law claims of tortious interference with employee benefit plans. The district court's judgement in favor of the former executives on this issue is reversed.

C.

The former executives argue an alterna-

tive basis for affirmance of the district court's award of punitive damages against Kalmanovitz in this case. The former executives contend that ERISA authorizes an award of punitive damages. The district court, on October 1, 1979, in ruing upon Falstaff's and Kalmanovitz's motions for partial summary judgement, held that punitive damages are not recoverable under ERISA. Calhoun v. Falstaff Brewing Corp., 478 F. Supp. 357,359 (E.D. Mo. 1979). In the only other reported decisions on this question, two district courts have reached different conclusions. Bittner v. Sadoff & Rudoy Industries, 490 F. Supp. 534, 536 (E.D. Wis. 1980) (not excluding punitive damages); Hurn v. Retirement Fund Trust, 424 F. Supp. 80, 82 (C.D. Cal. 1976) (opposite). We do not think punitive damages are provided for in ERISA. Ordinarily punitive damages are not presumed; they are not the norm; and nowhere in ERISA

are they mentioned. If Congress had desired to provide for punitive damages, it could have easily so stated, as it has in other acts. However, we need not decide this issue, because we find that punitive damages are inappropriate in this case under either 29 U.S.C. §1132(a) or §1140. Cf. International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, 48-52 (per se ban on punitive damages in union breach of fair representation suit). ERISA's section 1140 creates a federal statutory action for interference with employee benefit contracts. Congress recognized that the courts, in interpreting ERISA, would need to develop a body in federal common law to deal with the issues raised under the statute. See Landro v. Glendenning Motorways, Inc., 625 F.2d 1344, 1351 (8th Cir. 1980). We believe that, as a matter of federal common law, an award of punitive damages is inappropriate to a claim of interference with employee

benefit plans.

The common-law tort of interference with contractual relations extends back to the Ordinance of Labourers, enacted in England in 1349. The statute provided a remedy to an employer, whose laborer had run off to another employer, against the new employer. The ordinance in effect provided the legal mechanism "by which a system of compulsory labor was introduced." W. PROSSER, LAW OF TORTS §129, at 929 (4th ed. 1971). With this ominous beginning, the tort developed in the nineteenth century, to be used as a tool by employers to prevent the formation of unions. See Note, Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort, 93 HARV. L. REV. 1510, (1532-33 (1980). The entire history of the tort has been to protect vested interests against the onslaught of free and open competition.

The economic significance of the tort

would be limited, however, were it not for its damage provisions. Tortious interference with contract allows an injunctive remedy to be obtained in many cases. See PROSSER, supra, at 948. In addition, monetary damages can be obtained against the interferer rather than the breaching party. Finally, some courts have allowed the award of punitive damages. See, Annot., 26 A.L.R. 2d 1227, 1274 (1952).

The advantage to suing under the tort, rather than on the contract, results from these damage provisions. The tort allows the party who has suffered a breach to, at times, enjoin the breach and recover damages in excess of those allowed under the common law of contract. The tort also allows recovery if the party breaching the contract is unable to satisfy a contract judgement. The tort, therefore, provides an additional weapon to the potential party subject to a contractual breach to prevent or deter the breach.

Whether punitive damages should be allowed for tortious interference with contractual relations is therefore dependent upon the extent to which contractual breaches should be deterred. See Foust, supra, 442 U.S. at 50-51. The common law of contract refuses to allow an award of punitive damages. This refusal has been explained in terms of economic efficiency. So long as the party subject to the breach is compensated to the extent of his loss, there is no reason to penalize the breaching party for refusing to perform his contractual obligations. The breach frees the latter's resources to be used in a more efficient manner elsewhere. See Barton, The Economic Basis of Damages for Breach of Contract, 1 J. LEG. STUD. 277, 828-91 (1972); Dobbs, Tortious Interference With Contractual Relationships, 34 ARK. L. REV. 335, 360-61 (1981).

In the present case, the district court specifically found that "Kalmanovitz

was acting at all times relevant to this litigation in what he perceived to be in the interest of Falstaff and not on his own behalf." 491 F. Supp. at 1193. To the extent that Kalmanovitz intentionally interfered with the former executives' benefit plans in violation of 29 U.S.C. §1132 and §1140, the former executives are entitled to their actual damages. So long as Kalmanovitz acted in what he believed were the interests of Falstaff, there is no reason to impose punitive damages against him unless under the same circumstances Falstaff should be held liable for punitive damages.

The district court found that "Kalmanovitz had no justification for directing Falstaff to breach the contract." Id. at 1198. Therupon the court made its award of punitive damages. This was error, for neither Kalmanovitz nor Falstaff requires any justification to breach the contract. If Falstaff chose to breach, the

former executives may contest the breach by bringing suit under ERISA. If they are correct in their interpretation of the contract, then they will succeed in their suit, as they in fact have done. There is simply no reason to use punitive damages as an additional deterrent to breach of the employee benefit plan by Falstaff. See generally Perlman, Interference with Contractual and Other Economic Expenditures: A Clash of Tort and Contract Theory 38-44 (tent. draft, University of Virginia School of Law 1981).

As noted below, attorney fees and interest are available under ERISA to compensate the former executives for any financial loss they have suffered from the litigation. We also note that Falstaff and Kalmanovitz have contended that the benefit plans were terminated because the former executives were terminated "for cause" which, under the plan's terms, relieved Falstaff of any obligation. We

now turn to this issue.

D.

Falstaff next contends that the district court erred in finding that the former executives were not discharged for cause. See 491 F. Supp. at 1192-93. Falstaff charges that the former executives engaged in unethical, if not illegal, conduct, refused to properly follow directions, and were generally responsible for the company's poor financial picture at the time of the takeover. The district court found these contentions to be without merit. Id. Our court's factual findings on this issue were not "clearly erroneous." See FED. R. CIV. P. 52(a); United States v. United States Gypsum Co., 333 U.S. 364,395 (1948).

E.

In their cross-appeal, Healy and Dependahl contend the district court erred in finding that their terminations from employment were not the result of a fraudulent misrepresentation by Kalmanovitz.

Dependahl and Healy allege that Kalmanovitz represented that they would be retained after the takeover. The district court "found no such misrepresentations were made." 491 F. Supp. at 1199. The record supports this factual finding. "(T)here is no evidence that Kalmanovitz ever stated that plaintiffs would be retained after the takeover." Id. at 1191. We agree with this conclusion.

F.

Finally, the former executives assert that the district court erred in failing to render judgement on their implied claim of tortious interference with their employment contract. The former executives did not plead this cause of action in their complaint, nor did the district court make a finding on the issue. On appeal, the former executives contend that the issue was tried by the "implied consent of the parties" pursuant to Federal Rule of Civil

Procedures 15(b). [5]

In Gallon v. Lloyd-Thomas Co., 264 F.2d 821,825 n.3 (8th Cir. 1959), we stated the relevant standards for a Rule 15(b)

> "The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case was tried; therefore, an amendment after judgement is not permissible which brings in some entirely extrinsic issue or changes the theory on which the case was actually tried, even though there is evidence in the record--introduced as relevent to some other issue--which would support the amendment." (Emphasis supplied.) Vol. 3, Moore's Federal Practice §15.13 at pp. 846-847.

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[5] Federal Rule of Civil Procedure 15(b) provides in relevant part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgement; but failure to so amend does not affect the result of the trial of these issues. * * *

Given Falstaff's record of contesting every issue in this case, it is difficult to imagine that they impliedly consented to anything the former executives raised at trial. In this case, the record reveals that neither Falstaff nor the former executives tried the action on the theory of tortious interference with the employment contracts. While Falstaff's post-trial brief did address some aspects of this issue as it related to the ERISA claims, this did not change "the theory on which the case was actually tried." Id. See also St. Joe Minerals Corp. v OSHRC, No. 79-1873, slip op. at 7 (8th Cir. May 6, 1981) (no amendment where a party would be denied fair opportunity to present evidence).

IV.

The district court allowed prejudgement interest on the judgements obtained by the former executives resulting from Falstaff's ERISA violation pursuant to 29 U.S.C. §1132. The trial court allowed an

interest rate of nine percent as provided by MO. ANN. STAT. §408.020. Falstaff contends that the court erred in doing so, because up until September 28, 1979, Missouri law provided for a six percent statutory rate. We agree that the district court erred on this issue.

The question of whether interest is to be allowed, and also the rate of computation, is a question of federal law where the cause of action arises from a federal statute. See Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 715 (1945); Perkins v. Standard Oil Co. of California, 487 F.2d 672, 675 (9th Cir. 1973).

ERISA itself provides no express statutory authority for the award of prejudgement interest. Nor have we been able to find any reported case dealing with the award of prejudgement interest in an ERISA case. We therefore look for guidance to another area of federal labor law.

In Hodgson v. American Can Co., 440 F.2d 916, 922 (8th Cir. 1971), where we considered the propriety of awarding interest on a compensatory award of back wages under the Fair Labor Standards Act, 29 U.S.C. §217 (1970), the court relied on the following factors in awarding pre-judgement interest:

> Section 17 contains no language providing for either liquidate damages or interest. In the absence of an unequivocal prohibition of interest, and where the statute imposes a money obligation, the power of the court to award interest is dependent on an appraisal of the congressional purpose of imposing the obligation and on the relative equities of the parties. Rodgers v. United States, 332 U.S. 371, 68 S.Ct. 5, 92 L.Ed. 3 (1947). Clearly the award of back wages under the Fair Labor Standards Act is remedial in nature. 29 U.S.C. §202(b), Goldberg V. Wade Lahar Construction Co., 290 F.2d 408, 415 (8th Cir. 1961). The purpose of the award is to compensate the employees for the loss sustained because of the wrongful withholding of wages. While the good faith of the employer is one of many factors to be considered, "(t)o make such employees whole, the provision of the payment of interest for the time the back pay was wrongfully withheld from them is only equitable." Marshfield Steel Co. v. N.L.R.B., 324 F.2d 333,338

(8th Cir. 1963); Shultz v. Wheaton Glass Co., supra, 319 F.Supp. at 234 (D.N.J.1970). Both at law and equity, interest is allowed on money due. Miller v. Robertson, 266 U.S. 243, 256-258, 45 S.Ct. 73, 69 L.Ed. 265 (1924).

> From the inception of the discrimination, American Can was unjustly enriched and the female employees were damaged. During the entire period American Can has had the use of the money, and therefore equity and justice requires payment by way of interest for its use. The interest should be allowed from the dates of the underpayment.

We believe that these same considerations should be followed in an award of prejudgement interest with regard to an ERISA violation. The former executives have been denied their contractual severance benefits for a period of approximately four years before final judgement was rendered. Falstaff has continued to have the use of this money. Furthermore, the exact amount of the liability on the plans was never in issue. The only question was whether the employee benefit plan was binding in light of the "just cause" exception. Under these

circunstances, an award of prejudgement interest is necessary in order that the plan participants obtain "appropriate equitable relief." 29 U.S.C. §1132(a)(3)(B).

A subsidiary question is the rate at which the award of interest should be computed. 28 U.S.C. §1961 (1976) allows post-judgement interest on all civil judgements in federal court at the rate provided under state law.[6] We believe that section 1961

6/Title 28 U.S.C. §1961 provides:

> Interest shall be allowed on any money judgement in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgements recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgement, at the rate allowed by State law.

provides useful guidance in the area of prejudgement interest. In the interests of uniformity, we therefore hold that while federal law governs the issue of interest and its rate, state law should be incorporated in the determination of the proper rate to be allowed, once an independent finding is made concerning whether any prejudgement interest should be awarded.

In Missouri, interest is currently allowable on all written contracts, after demand for payment is made, at the rate of nine percent per annum. MO. ANN. STAT. §408.020 (Vernon Supp. 1981).[7] See Knights

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7/ MO. ANN. STAT. §408.020 (Vernon Supp. 1981) provides:

> Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt and for all other money due or to become due for the forebearance of payment whereof an express promise to pay interest has been made.

of Columbus v. Wirtz, 692 F.2d 466, 469 (8th Cir. 1979). Prior to September 28, 1979, the statutory rate was six percent per annum. Under a similar statute, post-judgement interest was raised on the same day from six to nine percent. MO. ANN. STAT. 408.040 (Vernon Supp. 1981).[8] The Supreme Court of Missouri, in an en banc opinion, has held that this new rate should be applied prospectively only. Senn v. Commerce-Manchester Bank, 603 S.W. 2d 551, 553-54 (Mo. 1980). We believe this holding

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8/ MO. ANN. STAT. §408.040 (Vernon Supp. 1981) provides:

> Interest shall be allowed on all money due upon any judgement or order of any court from the day of rendering the same until satisfaction be made by payment, accord or sale of property; all such judgements and orders for money upon contracts bearing more than nine percent interest shall bear the same interest borne by such contracts, and all other judgements and orders for money shall bear nine percent per annum until satisfaction made as aforesaid.

would be followed with respect to section 408.020.

Prejudgement interest is to be computed at a rate of six percent per annum up until September 28, 1979, and at a rate of nine percent thereafter.

V.

The final issue Falstaff raises on appeal is whether the district court abused its discretion in its award of attorney fees. The district court filed a written memorandum opinion awarding attorney fees to the former executives in the amount of $149,175, and litagion expenses of $13,000. Dependahl V. Falstaff Brewing Corp., 496 F. Supp. 215 (E.D. Mo. 1980).

We have carefully studied the record, including the district court's written memorandum decision, the briefs, and the oral arguments of the parties to the appeal on this issue. We find no merit in Falstaff's arguments, and accordingly affirm the award of attorney fees on the basis of Judge Nangle's

published memorandum decision. See id.; Landro v. Glendenning Motorways, Inc., 625 F.2d 1344, 1356 (8th Cir. 1980). It particularly appears that the award of attorney fees was appropriate and reasonable, as Kalmanovitz testified at trial that Falstaff had expended close to one million dollars in attorney fees in this case. The decision of the district court on this issue is affirmed, pursuant to Rule 14 of the Rules of this court.

Affirmed in part, reversed in part, and remanded for entry of a judgement in accordance with this opinion.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Charles Dependahl, John Calhoun and William Healy,	)	
	)	No.
Appellees,	)	.
v	)	
	)	
Falstaff Brewing Corporation, and Paul Kalmanovitz,	)	
	)	
Appellants.	)	

Appeal from the U.S. District Court
for the Eastern District of Iowa

The Court having considered petition for rehearing and suggestions for rehearing en banc of Falstaff, et al, and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

July 27, 1981

29 U.S.C. §1132(a)(1)(B)

"A civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

29 U.S.C. §1132(a)(3)

"A civil action may be brought by a participant or beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to address such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."

29 U.S.C. §1132(e)(1)

"Except for actions under §§(a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under §§(a)(1)(B) of this section."

29 U.S.C. §1132(g)

"In any action under this subchapter by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and cost of action to either party."

Opposition

Office-Supreme Court, U.S.
FILED
OCT 2 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-449

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FALSTAFF BREWING CORP. and PAUL KALMANOVITZ,
Petitioners,

vs.

CHARLES W. DEPENDAHL, JR., WILLIAM J. HEALY and JOHN C. CALHOUN,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

	Page
Statement of Case	1
Reasons Why The Writ Should Be Denied	2
I. The District Court's Discretion To Award Attorneys Fees For Work Performed In Other Cases	2
II. The District Court's Discretion To Award Attorney's Fees In Connection With Pendant State Law Claims	3
III. Whether The Life Insurance Plans Were Unfounded	4
IV. Sanctions	5
V. Discharge For Cause	6
Conclusion	6

CITATIONS

Berenyi v. Immigration Director, 385 U.S. 630 (1967)	2
Baughman v. Wilson Freight Forwarding Co., 583 F.2d 1208 (3rd Cir. 1978)	4
National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976)	5
Levy v. Lewis, 635 F.2d 960 (2nd Cir. 1980)	5
29 U.S.C. § 1132(g)	3,4
29 U.S.C. § 1003(b)(5)	4,5

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF CASE

The "statement of the case" appearing at pp. 2-7 of the petition for certiorari is misleading in numerous respects. Petitioners Falstaff Brewing Corporation (Falstaff) and Paul Kalmanovitz (Kalmanovitz) have chosen to present this Court with a version of the facts rejected by both the District Court and the Court of Appeals.

The actual facts of this case, as found by the District Court, appear at pp. 15-31 of the Appendix.

REASONS WHY THE WRIT SHOULD BE DENIED

The principal reason why the Court should deny this petition for writ of certiorari is that petitioners have completely failed to present any issues worthy of review by this Court. Petitioner's obvious dissatisfaction with the opinion of the court of appeals is no substitute for an issue of national significance appropriate for this Court's review. Second, each of Petitioners' points requires review of factual issues determined adversely to Petitioners in the courts below. Such a review is inappropriate for this Court **Berenyi** v. **Immigration Director,** 385 U.S. 630 (1967).

Respondents will comment briefly on each of the five reasons presented for granting the writ.

1. The District Court's discretion to award attorneys fees for work performed in other cases.

Petitioners first argument is that the district court abused its discretion under 29 U.S.C. Section 1130(g) by awarding attorneys' fees for work performed in other lawsuits pending around the country. Entirely absent from this "point" is any suggestion of a conflict between the circuits or any important national interest in resolving the issue. On the contrary, a brief review of the facts will demonstrate that this situation is unlikely to recur.

The original action was brought by respondents to enforce their rights to severance pay and life insurance plans established by Falstaff. Falstaff filed affirmative defenses and counterclaims which, if true, would have warranted a judgment in favor of Falstaff. Unfortunately, Falstaff felt compelled to file precisely the same claims against respondents in five other cases, referred to at page 13 of the petition.[1] An adverse judg-

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[1]The complaint that attorneys' fees were awarded for work done during certain administrative investigations is simply untrue, and points up petitioner's efforts to have this Court resolve factual disputes previously determined against them.

ment in any of these other actions might well have estopped respondents from contesting the truth of the affirmative defenses and counterclaims in the instant action. It is precisely for that reason that the district court, with full knowledge of the facts, concluded that the work done in these other jurisdictions was essential to protect respondents' rights in the instant litigation. App. at 60.

Given these findings, petitioners' claim is reduced to the proposition that this Court should review discretionary award of attorneys' fees, based on express factual findings, and pursuant to explicit statutory authority. 29 U.S.C. Section 1132(g). Not only is that issue inherently unworthy of this Court's attention; it is unlikely to recur, because few litigants feel compelled to abuse the Federal Rules of Civil Procedure in quite the same fashion as Falstaff and Kalmanovitz.

II. **The District Court's discretion to award attorneys' fees in connection with pendant state law claims.**

Petitioners' second point asserts that a district court may not make an attorneys' fee award in an ERISA case for pendant state law claims in which plaintiffs were unsuccessful. Again, this point seeks review by this court of the discretionary award of attorneys' fees based on appropriate factual findings.

The district court expressly found that an allocation between successful and unsuccessful claims was inappropriate, because all such issues were interrelated and work on any one issue necessarily benefitted the resolution of the others. App. at 61. Thus, the work would have been necessary regardless of the presence or absence of pendant state claims.

Again, there is a complete absence of any reason for this Court to review such a discretionary award. If the cases cited at pp. 20-22 of the petition are intended to suggest that there is a conflict among the circuits with regard to this matter, those cases are plainly inapposite. First, none of these cases involves

the attorneys' fee provision under ERISA, 29 U.S.C. Section 1132(g). Second, each case emphasizes the discretion accorded to a district court in the award of attorneys' fees. Third, the only case cited by petitioners in which a district court fee award was criticized as excessive is **Baughman** v. **Wilson Freight Forwarding Co.**, 583 F.2d 1208 (3rd Cir. 1978). In that case, there was no finding that the work done in connection with the state law claims benefitted the resolution of the Federal Anti-trust claims there at issue. Precisely the opposite is true in the instant case.

Falstaff expended close to a million dollars in attorneys' fees itself, App. at 107, the effect of which was an uncooperative and recalcitrant attitude requiring many hours of legal work by plaintiffs' attorneys. App. at 56. In these circumstances, it ill becomes petitioners to criticize an award of less than one-sixth the sum they themselves spent.

III. **Whether the life insurance plans were unfunded.**

Petitioners' third point asserts that the life insurance plans here in issue are "unfunded" within the meaning of 29 U.S.C. §1003(b)(5). A brief factual review is again necessary to demonstrate why this issue is entirely inappropriate for this court's review.

The life insurance plans here in question were an ordinary type of split dollar plan. Falstaff owned the policies and paid the premiums. Upon the death of one of the insured executives, the insurance carrier would refund to Falstaff the amount of its premiums, plus 3% interest, while paying the remaining proceeds of the policy directly to the beneficiary designated by the executive. As a result, the executive had a beneficial interest in the policy, and the proceeds payable to his named beneficiaries were not accessible to Falstaff's general creditors. It is precisely for this reason that the District Court concluded that benefits would be paid through the insurance contracts, rather than from Falstaff's general assets. App. at 41. The court of appeals agreed, in holding that the employee could look to a res separate

from corporate assets on the contingency which triggers the liability of the plan. App. at 82.

On this factual history, the life insurance plans in question are entirely consistent with the revenue rulings cited at page 26 of the petition, and with **Levy** v. **Lewis**, 635 F.2d 960 (2d Cir. 1980). Once again petitioners seek to have this Court review factual findings with which they are dissatisfied.

Two additional comments are in order. First, petitioners did not present this issue to either the district court or the court of appeals. While Falstaff did contend that the life insurance plans were unfunded, at no point did it advise either the court of appeals or the district court of the revenue rulings referred to at page 26 of the petition. Falstaff is poorly placed to urge this court to make different factual findings based on new criteria which, if applicable at all, were not presented to the court below.

Second, even if this Court were to reach different factual conclusions about the funding of the life insurance plans, the result would be no different. Even if the plans were unfunded, they were not "excess benefit plans" within the meaning of 29 U.S.C. 1003(b)(5), because they were neither pension nor deferred compensation plans. Moreover, respondent's rights under the plans were enforceable at common law on contract theories, and the district court had jurisdiction of the parties pursuant to diversity of citizenship. Review by this Court would thus avail petitioners nothing.

IV. **Sanctions.**

Petitioner's fourth issue is whether the district court abused its discretion in imposing sanctions pursuant to Rule 37 of the Federal Rules of Civil Procedure. This court recently had occasion to announce the standards for Rule 37 sanctions **National Hockey League** v. **Metropolitan Hockey Club, Inc.**, 427 U.S. 639 (1976). The district court meticulously followed and applied

the standards announced in **National Hockey League**, App. at 12-13. Review of the district court's discretionary rulings on discovery sanctions is clearly inappropriate.

V. **Discharge for Cause.**

Petitioners' fifth issue is that the district court clearly erred in its factual findings that respondents were not discharged for cause. Neither the district court nor the court of appeals agreed, and it is surely not appropriate for this court to review the factual findings in issue. **Berenyi** v. **Immigration Director**, *supra*.

CONCLUSION

The district court expressly found that Kalmanovitz had acted in maliciously and in bad faith, with utter contempt for the welfare and rights of plaintiffs as well as for the normal rules of procedures and ethics. App. at 54. This uncooperativeness and recalcitrance required many hours of unnecessary legal work by plaintiff's attorneys. App. at 56. The instant petition for writ of certiorari is but another illustration of that malice and bad faith. The issues presented are frivolous and wholly inappropriate for review by this Court. The Petition for writ of certiorari should be denied.

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